TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~258.~~ 62

STEPHEN BIRD AND THOMPSON BIRD, EXECUTORS OF JOHN BIRD, DECEASED, PLAINTIFFS IN ERROR,

vs.

THE LOUISIANA STATE BANK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

FILED SEPTEMBER 22, 1874.

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1 UNITED STATES OF AMERICA.

Circuit court of the United States, fifth circuit, and district of Louisiana.

STEPHEN BIRD ET AL., EXECUTORS OF JOHN Bird,
vs.
THE LOUISIANA STATE BANK.
No. 6044.

Petition.—Filed January 5th, 1870.

To the honorable the judges of the circuit court of the United States for fifth circuit and district of Louisiana.

The petition of Stephen Bird and Thompson Bird, citizens of the State of Missouri, testamentary executors of the last will and testament of John Bird, late of said State of Missouri, duly probated and of record in the county of Mississippi, State of Missouri, and also of record and duly qualified in the parish court in and for the parish of East Baton Rouge, La., with respect, represents—

2 That on the 28th day of January, 1859, R. A. Stewart executed his promissory note to the order of Henry Dogal, payable at Citizens' Bank of La. twelve months after its date, for five thousand seven hundred dollars, bearing interest at eight per cent. per annum from its date till paid. Said note was endorsed in blank by said Doyal, and was negotiated with said John Bird before maturity, who became the legal holder of the same. Shows that petitioner placed said note for collection in the branch of the Louisiana State Bank at Baton Rouge, which undertook to collect the same; that before said note became due the same was remitted by said branch bank to the Louisiana State Bank in New Orleans, said Louisiana State Bank being a citizen of the State of Louisiana, and having its domicil for itself and branches in said city of New Orleans, for collection. Said note was presented for payment when payable, but, payment being refused, said Louisiana State Bank caused said note to be protested for non-payment by E. G. Gottschalk, notary public, the cashier of said bank, C. A. F. Roudeau, giving

3 special instructions to said notary to serve notice of protest on Philip Rotchford, stating that said Rotchford was the attorney in fact of said Doyal. Said notary served notice as directed, and also sent duplicate notices to the last endorser for collection, Wm. S. Pike, cashier of said branch bank at Baton Rouge, for service on the previous endorsers.

Shows that soon after said note was protested said Bird brought suits on the same, as well against the representatives of the estate of said Doyal as against his heirs who had accepted his succession, the suit against said heirs having been commenced in the sixth district court of New Orleans, and was carried by appeal before the supreme court of the State of Louisiana, where a final judgment was rendered against said John Bird and in favor of said heirs of Henry Doyal; and said John Bird used all diligence to make the same from the said estate and the said heirs without success, petitioners' failure being caused en-

4 tirely by the gross fault and negligence of said State Bank of Louisiana—

1st. In having improvidently and negligently given positive instructions to the said notary to serve notice of protest on said Rotchford; whereas if said directions had not been given, said notary would, in pur-

suance of his duty, have ascertained on slight inquiry that said endorser was dead; that his last place of residence was at New River, parish of Ascension, where his executors and one or more of his heirs then lived, and that said Rotchford was not authorized to have notice of protest served upon him for said Doyal.

2d. Duplicate notices of protest having been sent by said notary to the cashier of the branch bank at Baton Rouge, it was the duty of said branch bank and said cashier, as the principal officer of said bank, acting for the branch thereof at Baton Rouge, to have forwarded said notice to the representatives of said endorser, Doyal, or to have furnished the means of proving that said service was made, which he failed to do; said Louisiana State Bank,
5 by said acts of negligence and failure to perform its duty through its agents, having caused damage to said Bird to the entire amount of said note and costs of suit. The said R. A. Stewart being insolvent and the estate of said Doyal being solvent, and the heirs of said Doyal who had accepted his succession also being solvent, the whole amount of said note and costs could have been made from said estate and said heirs if due notice of the dishonor of said note had been given to the representatives of the said endorser.

Petitioner further represents that said debt has been amicably demanded in vain.

Wherefore petitioner prays that said Louisiana State Bank may be duly cited to appear and answer this petition, and that the same may be duly ordered, adjudged, and decreed to pay to your petitioner the sum of six thousand one hundred and sixty-one dollars, the amount of said promissory note, interest, and protest, with five per cent.
6 interest thereon from the date of said defective protest until paid, and for general relief in the premises.

(Signed) By RACE FOSTER AND
E. T. MERRICK,
Attys. for Petitioner.

Citation.—Issued January 5th, 1870.

STEPHEN BIRD & AL., EXECUTORS OF BIRD,
vs.
THE LOUISIANA STATE BANK. } No. 6044.

The President of the United States of America to the marshal of the district of Louisiana, greeting:

You are hereby commanded to summon the Louisiana State Bank, citizen of the State of Louisiana, to comply with the demand of Stephen Bird and Thompson Bird, testamentary executors of John Bird, and citizens of the State of Missouri, contained in the petition of which a copy accompanies the citation, or to deliver its answer to the same in the office of the clerk of the circuit court of the United States, fifth
7 judicial circuit, and district of Louisiana, in the city of New Orleans, in ten days after the service hereof, or judgment will be rendered against it by default, which delay is increased one day for every ten miles the defendant's residence is distant from New Orleans, the place where the court is held; and that you make due return hereof on the first Monday of February, 1870.

Witness the Hon. Salmon P. Chase, Chief-Justice of the Supreme Court of the United States of America, at the city of New Orleans, this

5th day of January, A. D. one thousand eight hundred and seventy, and of the Independence of the United States of America the 94th year.

[SEAL.] (Signed) D. URBAN, *Clerk*,
By F. B. VINOT, *D'y Clk.*

Marshal's return.

Received Jan'y 5th, 1870, by the United States marshal, and on the 6th day of the same month and year served a copy of the within citation and accompanying petition on the Louisiana State Bank, through its president, Jules A. Blanc, by delivering the same to him in person.

8 New Orleans, January 6th, 1870.
(Signed) S. W. REED,
D'y U. S. Marshal.

Exception.—Filed January 15th, 1870.

STEPHEN BIRD ET AL., EXECUTORS OF BIRD,
vs.
THE LOUISIANA STATE BANK. } No. 6044.

In the circuit court of the United States, fifth circuit, and district of Louisiana.

The said defendant now comes and excepts to the right and capacity of the said plaintiffs to bring or prosecute this suit, because it does not appear that they have duly appointed, given bond, or qualified as testamentary executors, as is required by law.

Whereupon respondents pray that this exception be maintained, and that they be excused from answering herein.

(Signed) J. MCCONNELL,
Atty. La. State Bank.

9 *Document.—Filed February h*, 1870.

Pro parish court, East Baton

IN THE MATTER OF SUCCESSION OF JOHN BIRD. } No. 1026.

To the hon. the parish judge of the parish of East Baton Rouge, State of Louisiana:

The petition of Stephen Bird and Thompson Bird, testamentary executors of the last will and testament of John Bird, late of the county of Mississippi, State of Missouri, with respect, represents—

That they present herewith to your hon. court a duly certified copy of the last will and testament of said deceased, duly executed and probated, and of record in said Mississippi County, State of Missouri, according to the laws of said State.

They further show that the said deceased had large interests, both real and personal, in the State of Louisiana, and particularly in the parish of East Baton Rouge.

Shows that in order to carry into effect the said will on prop-
10 erty in this State it is necessary that the same should be duly

registered in your hon. court, as provided in arts. 1681, 1682 of the civil code.

Wherefore petitioners pray that the last will and testament of the said John Bird and the probate proceedings, copies of which, duly certified and authenticated according to act of Congress, are annexed and made part hereof, be duly registered in your hon. court; that the same be ordered to be executed according to its tenor, and petitioners recognized as executors thereof, and for general relief.

By their counsel.

(Signed) SAML. P. GREVES.

Having read and considered the prayer of the foregoing petition and the documents annexed, I grant the following order:

Let the last will and testament of the deceased John Bird, a duly certified copy of which, under the signature of the probate judge and seal of the court of Mississippi County, State of Missouri, together with the probate proceedings connected therewith and annexed
11 hereto, be duly registered in this court, and let the same be executed according to its tenor, and let the executors named in said will, to wit, Stephen Bird, first executor, and Thompson Bird, second executor, be recognized as the duly qualified executors of said will.

Dec. 3rd, 1868.

(Sgd.) G. M. HUSTED,
Parish Judge.

STATE OF LOUISIANA,
Parish of East Baton Rouge:

PARISH COURT, CLERK'S OFFICE.

I certify that the foregoing is a true copy of the original on file and of record in this office.

Given under my hand and seal of office this 24th day of January, 1870,

[SEAL.] (Signed) JAS. COOPER,
D'y Clk.

Document.—Filed Febr'y 4th, 1870.

Parish court, East Baton Rouge, La.

IN THE MATTER OF THE SUCCESSION OF JOHN BIRD, DECEASED. } No. 1026.

§25 stamp on probate of will.]

STATE OF MISSOURI,
County of Mississippi:

12 To all persons to whom these presents shall come, greeting:

Know ye that the will of John Bird, deceased, hath in due form of law been exhibited, proved, and recorded in the office of the probate court of the county of Mississippi, a copy of which is hereto annexed; and inasmuch as it appears that Stephen Bird and Thompson Bird has appointed executor in and by the said last will and testament to execute the same, and to the end that the property of the testator may be preserved for those who shall appear to have a legal right or interest therein, and that the said last will may be executed

according to the request of the testator, we do hereby authorize them, the said Stephen Bird as first, and Thompson Bird as second, as such executors, to collect and secure all and singular the goods and chattels, rights and credits, which were of the said John Bird at the time of his death, in whosesoever hands or possession the same
13 may be found, and to perform and fulfill all such duties as may be enjoined upon them by said will, so far as there shall be property and the law charges them, and in general to do and perform all other acts which now are or may be hereafter required of them by law.

In testimony whereof I, Thomas S. McElmurry, judge of the probate court of Mississippi County, have hereunto signed my name and affixed the seal of said court, at office, this 29th day of September A. D. 1868.

[SEAL.] (Signed) THOS. S. McELMURRY.

Copy of John Bird's will.

1st. I desire that my funeral expenses, and tombstones for myself, wife, and son, Thos. J. Bird, also the expenses of administration on my estate, shall be paid.

2nd. I give, bequeath, and devise unto my grandson, John Abraham Hunter, ($1,500.00), fifteen hundred dollars in cash, and the following land, to wit: Southeast quarter section 31, township 25, range 18; northeast fractional quarter section 6, township 24, range 18,
14 it being that portion I intend giving him at the time he is of age, as I have already given him ($5,000.00) five thousand dollars, besides other property.

3rd. I give, bequeath, and devise all the residue of my property, real and personal, wherever situated, and of whatever kind, to my children, Thompson Bird, William Bird, Stephen Bird, Nancy E. Bird, Clarissa Bird, and Andrew J. Bird, and desire that said property be equally divided among them according to the laws of this State.

4th. I do hereby appoint and constitute my sons, 1st, Stephen Bird, 2d, Thompson Bird, the executors of this my last will and testament; and having full confidence in their integrity and probity, I desire that letters be granted to them without requiring bond, which is usual in such cases.

5th. That my son Stephen Bird have full power to sell or dispose of any land that he might think best for the benefit of said estate, except the land willed to John Abraham Hunter.

15 (Signed) JOHN BIRD.

We attest the above and foregoing will by subscribing our names thereto, by the request and in the presence of John Bird, the testator, and of each other, this 24th day of January, 1866.

(Signed) JOSEPH N. CLARK,
(do.) J. B. GREENFIELD.

STATE OF MISSOURI,
County of Mississippi:

I, Thos. S. McElmurry, judge of the probate court of Mississippi County, having examined the foregoing instrument of writing, purporting to be the last will of and signed by John Bird, and the testimony of Joseph N. Clark and James B. Greenfield, the witnesses above. named, do adjudge and declare the said instrument of writing to be the last will and testament of John Bird, deceased. Therefore the said will is admitted to probate.

In testimony whereof I have hereunto set my hand and affixed the seal of said court of Mississippi County this the 29th day of September, A. D. 1868.

16

(Signed) THOS. S. McELMURRY, *Judge.*

STATE OF MISSOURI,
County of Mississippi :

Be it remembered that on this the twenty-ninth day of September, A. D. 1868, before me, Thomas S. McElmurry, judge of the probate court within and for said county and State aforesaid, personally appeared James B. Greenfield and Joseph N. Clark, who, being by me duly sworn, depose and say upon oath that they were present, and said John Bird signed the annexed instrument, purporting to be the last will and testament of him, the said John Bird, and heard him publish and declare the same to be his last will and testament; and further, that at the time of signing the same the said John Bird was of sound and disposing mind, and that these deponents and witnesses to the said will did subscribe their names as witnesses to the said will in the presence of the testator and of each other, and at the request of the said John Bird.

17

(Signed) J. N. CLARK.
(Signed) J. B. GREENFIELD.

Sworn and subscribed before me this the day and date aforesaid. In testimony whereof witness my hand and the seal of the said court, hereto affixed, the day and date aforesaid.

(Signed) THOS. S. McELMURRY, *Judge.*

STATE OF MISSOURI,
County of Mississippi, ss :

I, Thomas S. McElmurry, judge of the probate court, and ex-officio clerk thereof, in and for the county aforesaid, do hereby certify that the foregoing is a true and perfect copy of the will of John Bird, together with the proof and probate thereof, as the same remains on file and of record in my office.

In witness whereof I have hereunto set my hand and seal of said court, at office in Charleston, this 29th day of September, A. D. 1868.

(Signed) THOS. S. McELMURRY.

STATE OF MISSOURI,
County of Mississippi, ss :

18 I, James H. Bethune, clerk of the county court of said county, do hereby certify that Thomas S. McElmurry, whose genuine signature appears to the foregoing certificate, is, and was at the time of signing the same, judge of said probate court and ex-officio clerk thereof, and ex-officio president of the county court of said county, and that full force and credit are due all of his official acts as such judge and ex-officio clerk, and that his attestation is in due form of law.

Witness my hand and the seal of said county court, at office in Charleston, this 17th day of November, 1868.

(Signed) J. H. BETHUNE, *Clerk.*

STATE OF MISSOURI,
County of Mississippi, ss :

I, Thomas S. McElmurry, judge of the probate court, and ex-officio president of the county court of said county, do hereby certify that

James H. Bethune, whose genuine signature appears to the within certificate, is, and was at the time of signing the same, clerk of said
19 county court, duly qualified as such, and that his attestation is in due form.

In witness whereof I have hereunto set my hand and seal of said probate court, at office in Charleston, this 17th day of November, 1868.

(Signed) THOS. S. McELMURRY, *Judge.*

STATE OF LOUISIANA,
Parish of East Baton Rouge:

I hereby certify that the foregoing is a true and correct copy of all documents filed and proceedings had in the succession of John Bird, deceased, No. 1026, on file and of record in my office.

Given under my hand and seal of office, at Baten Rouge, this 28th day of January, A. D. 1870.

[SEAL.] (Signed) B. F. BRYAN, *Clerk.*

Parish court, East Baton Rouge.

I, G. M. Husted, parish judge in and for the parish of East Baton Rouge, State of Louisiana, do hereby certify that B. F. Bryan is clerk of the parish court of said parish, and that his signature to the
20 foregoing is genuine.

Witness my hand and the seal of said court this 28th January, 1870.

[SEAL.] (Signed) G. M. HUSTED,
Parish Judge.

STATE OF LOUISIANA,
Parish of East Baton Rouge:

PARISH COURT, CLERK'S OFFICE.

I, B. F. Bryan, clerk of the court in and for said parish and State, do hereby certify that G. M. Husted is judge of said court, and that his genuine signature appears to the foregoing certificate.

Given under my hand and seal of office this 28th January, 1870.

[SEAL.] (Signed) B. F. BRYAN, *Clerk.*

Order: Exception overruled.—Extract from minutes, November term, 1869.

NEW ORLEANS, *February 11th,* 1870.

Court met pursuant to adjournment. Present, Hon. E. H. Durell, district judge.

STEPHEN BIRD & AL. *vs.* LA. STATE BANK. } No. 6044.

21 The exception filed by the defendant came up—Race Foster & E. T. Merrick for plffs.; J. M. McConnell, for defdt., not present—when, after hearing counsel,

Ordered, that the exception be overruled, with costs.

Answer, with prayer for trial by jury.—Filed March 18th, 1870.

STEPHEN BIRD ET AL., EXECUTION OF BIRD,
vs.
THE LOUISIANA STATE BANK. } No. 6044.

In the circuit court, fifth judicial circuit and district of Louisiana.

The said defendant now comes into court, and for answer denies all and singular the allegations contained in the plaintiffs' petition, and prays for trial by jury and for general relief.

(Signed) J. McCONNELL,
Atty. La. State Bank.

Consent.—Filed June 2d, 1870.

BIRD, EXR.,
vs.
THE LOUISIANA STATE BANK.

22 The above-entitled case, if reached, it is agreed shall be continued by preference.

New Orleans, June 2d, 1870.

(Signed) RACE FOSTER AND E. T. MERRICK.
(Signed) J. McCONNELL,
Atty. for La. State Bank.

Pleas of prescription.—Filed May 31st, 1873.

S. BIRD, EXR.,
vs.
LOUISIANA STATE BANK. } No. 6044. U. S. circuit court.

The said defendant now comes, and, for peremptory exceptions to the plaintiffs' suit, pleads the prescription of one and five years as established by the laws of the State of Louisiana. More than five years having elapsed since the date of the maturity of the note in question, prior to the institution of this suit, the plaintiffs have lost their right of action against the maker of said note, and are consequently unable to subrogate the defendant to plaintiffs' rights as they existed at the date of the protest or maturity of the said note.

Therefore respondent prays that plaintiffs' suit be dismissed.

(Signed) J. McCONNELL,
Atty. for Defdt.

23 *Hearing of cause and order continuance.—Extract from minutes, November term, 1873.*

NEW ORLEANS, *Monday, January 19th,* 1873.

Court met pursuant to adjournment. Present, Hon. E. H. Durell, district judge.

S. BIRD, EXR.,
vs.
LA. STATE BANK. } No. 6044.

This cause came up for trial—Race Foster & E. T. Merrick for plff.; J.

McConnell for defdt.—when the following jurors were called and sworn to try the issue:

1. T. A. GRANDPRE.
2. FRED. FRYE.
3. RICHARD TRIMBLE.
4. J. ASBURY.
5. HENRY COOPER.
6. J. C. HUBBELL.
7. E. M. LEVINGSTON.
8. STEPHEN LEWIS.
9. WM. HARPER.
10. N. BERTRAND.
11. HENRY DREXEL.
12. EUGENE DUPLESSIS.

And, the jury being complete, it was ordered that the exceptions be consolidated and tried together. And after hearing the pleadings and the evidence, the cause is continued till to-morrow at 11 a. m.

24 *Hearing of cause.—Continuance.—Extract from minutes, January 20th,* 1874.

S. BIRD & AL. *vs.* LA. STATE BANK. } No. 6044.

This cause was resumed, when, by written consent of counsel, the jury is waived and withdrawn and the cause tried before the court. And after hearing further evidence and argument, the cause is continued till to-morrow at 12 m.

Stipulation waiving trial by a jury.—Filed January 20th, 1874.

BIRD, EXECUTOR, *vs.* LA. STATE BANK. } No. 6044.

It is hereby agreed that the trial by jury in this case be waived, and that the cause shall be tried and decided by the court without a jury.

(Signed) J. MCCONNELL,
Atty. for Defendant.

Jany. 20th, 1874.
(Signed) RACE FOSTER & E. T. MERRICK,
Of Counsel for Plffs.

25 *Order: Cause continued.—Extract from the minutes, Jany. 21st,* 1874.

S. BIRD *vs.* LA. STATE BANK. } No. 6044.

For want of time, it is ordered, in presence of counsel on both sides, that the cause be continued till to-morrow, at 11 a. m.

Hearing and submission of cause.—Extract from minutes, January 22d, 1874.

S. BIRD & AL. *vs.* LA. STATE BANK. } No. 6044.

This cause was resumed; and after hearing further argument, the court took time to consider.

Judgment.—Extract from minutes, February 11th, 1874.

BIRD, EXR., *vs.* LA. STATE BANK. } No. 6044.

For reasons orally assigned by the court, it is ordered, adjudged, & decreed that there be judgment for the defendant, with costs.

26 *Rule and grounds for a new trial.—Extract from the minutes, & filed Febry. 16th, 1874.*

STEPHEN BIRD ET AL., EXECUTORS OF BIRD, *vs.* LOUISIANA STATE BANK. } No. 6044.

On motion of Race Foster and E. T. Merrick, of counsel for plaintiffs, it is ordered by the court that defendants show cause on Wednesday, the 18th of February, 1874, at 11 o'clock a. m., why a new trial should not be granted herein on the following grounds, viz:

1st. That said judgment is clearly contrary to the law and the evidence.

2d. It is contrary to the evidence in this, among other things: The testimony of Pike, cashier, and of Gottschalk, the notary, establish that the collecting business between the branch bank at Baton Rouge and the mother bank in this city, was very large, and that it was the invariable custom of the bank to have its notary endorse all notices of protest for endorsers under cover to said W. S. Pike, cashier at Baton
27 Rouge, which was done in this case, and it was for said cashier, under said invariable custom made by the bank for the government and guidance of its own officers, to forward all notices to the endorsers whom the bank desired to hold.

That the testimony and certificate of the notary show that a notice for Henry Doyal, endorser, was duly forwarded by him in this case to said Pike, cashier, and that defendants failed to show that said Pike ever sent said notice to Henry Doyal at New River, his post-office. The testimony of W. A. Elmore and of Rotchford show that Henry Doyal, the endorser, had been dead one year and two days at the date of the protest of said note; that he was a citizen well known throughout the State; that his succession had been opened and his executors qualified and in possession of his estate long before said protest; and there is not even a pretense that any notice of protest was sent by Pike to
28 the executors of Doyal, as it was his duty to have done. The testimony and certificate of the notary show that by and under instructions from Mr. Rondeau, the cashier of the mother bank, he left a duplicate notice of protest for Henry Doyal, endorsed at the office of Rotchford, Brown & Co., in this city, for Rotchford, the agent of Doyal before his death, and that had he known the P. office of Doyal he would have sent a notice there for him.

And it having been shown by the transcript of the suit of John Bird vs. Executors of Henry Doyal, No. 18267, in the 6th dist. court, and by the decision of the supreme court of Louisiana therein, that the plaintiff failed to recover on the note in question on the ground there had been no notice of protest sent to said Doyal.

3rd. The judgment is contrary to law in not holding the bank liable for its fault in not giving proper notice to Henry Doyal of the protest of the note, as it had undertaken to do.

4th. The death of Henry Doyal was so well known that any
29 inquiry by the officers of the bank would have given them that information; & as they, under their own invariable custom, had agreed to give notice of protest to all endorsers, it was lashes in them not to send notice of protest in this case to the executors of Doyal, and they are liable to plaintiff for such negligence.

And it is no answer to this to say that John Bird, the owner and depositor of said note, ought to have informed the bank of the death of Henry Doyal, as said John Bird resided in the State of Missouri, which fact was well known to said Pike, cashier.

Order: New trial refused.—Extract from minutes, Febr'y 11th, 1874.

BIRD & AL., EXECUTOR,
vs.
LA. STATE BANK. } No. 6044.

The rule for a new trial was called—Race Foster & E. T. Merrick for plffs. in rule; J. M. McConnell for defdt.—when, after hearing
30 argument, it is ordered that the rule be dismissed and a new trial refused, with costs.

Final judgment from judgment-book.—November term, 1873.

NEW ORLEANS, *Wednesday, February 11th*, 1873.

Court met pursuant to adjournment. Present, Hon., E. H. Durell, district judge.

S. BIRD & AL., EXOR.,
vs.
LA. STATE BANK. } No. 6644.

For reasons orally assigned by the court, it is ordered, adjudged, and decreed that there be judgment for the defendant, with costs.

Judgment rendered February 11th, 1874.

Judgment signed Fe'ruary 19th, 1874.

(Signed) E. H. DURELL, *Judge.*

Plaintiffs' bill of exception No. 1.—Filed April 1st, 1874.

In the U. S. circuit court.

STEPHEN BIRD ET AL., EXECUTORS OF JOHN Bird,
vs.
THE LOUISIANA STATE BANK. } No. 6044.

Be it remembered that on the trial of this cause, it having been proven by the testimony of W. S. Pike, the cashier of the branch
31 of the Louisiana State Bank at Baton Rouge, La., and by other witnesses, and their being no evidence to the contrary, that the note in controversey in this suit, viz, a note dated New Orleans, January 28th, 1859, drawn by R. A. Stewart to the order of and endorsed by H. Doyal, payable at twelve months from date, and bearing eight per cent. interest from date, and payable at the Citizens' Bank of La., also endorsed by A. Bird, who resides near Baton Rouge, and also "pay to

the order of C. A. F. Roundeau, esq., cashier, Wm. S. Pike, cashier," was before its maturity deposited by said A. Bird, on behalf of said John Bird, who resided in the State of Missouri, in the branch of the defendant's bank at Baton Rouge, with said W. S. Pike, its cashier, for collection, and that said Pike transmitted said note for collection to the mother bank at New Orleans, the defendants, with his special endorsement thereon, "Pay to the order of C. A. F. Roundeau, esq., Wm. S. Pike, cashier;" that said C. A. F. Roundeau was at that time the cashier of the Louisiana State Bank, the defendants. Further,
32 that said John Bird, who resided in Missouri, dealt largely in the purchase of commercial paper, and deposited all such with the branch of defendants at Baton Rouge for collection, where he had an account in his own name.

It having been further proven by the testimony of W. S. Pike, cashier, and by the testimony of E. G. Gottschalk, then and for many years the regular and only notary public of the defendants, and there being no testimony to the contrary, that it was the invariable custom and practice between the Louisiana State Bank, its branch at Baton Rouge, and its notary in New Orleans, for the latter, Gottschalk, notary, in all cases of protesting notes sent to the branch bank at Baton Rouge, to send all notices of protest under cover addressed to W. S. Pike, cashier, at Baton Rouge, and it was, under said invariable custom of the bank, the duty of said Pike, cashier, to serve all notices of protest on all prior endorsers whom the bank desired to hold liable.

It having been further shown by the certificate of said E. G.
33 Gottschalk, notary, as well as by his testimony, and there being no evidence to the contrary, that said C. A. F. Roundeau, cashier of defendants, placed said note in question in his hands for protest, which was duly made on the 31st of January, 1860, and on the same day, and in accordance with said invariable custom of the bank, he, notary, deposited in the post-office in New Orleans, post-paid, notices of protest for the several endorsers on said note, including one for H. Doyal, endorser, all under cover addressed to W. S. Pike, cashier, at Baton Rouge, La.

And it has not been shown by the testimony of said W. S. Pike, cashier, or by any other testimony, that he or any other person ever forwarded said notice of protest for Henry Doyal to him at his post-office at New River. Mr. Pike's testimony is that he has no recollection of ever having received the notices of protest in this case; that if he did receive them, and if at that time he knew the post-office of H.
34 Doyal to be at New River, he has no doubt he sent the notice there. But he is not certain that at that time he knew the post-office of H. Doyal to be at New River; thinks he did.

And it having been shown by the certified transcript of the suit of John Bird vs. The Heirs of Henry Doyal, and by the decision of the supreme court of Louisiana rendered therein, that said plaintiff failed to recover the amount of the note herein from the heirs of Doyal, on the ground there had been no legal notice of protest served on said H. Doyal or his legal representatives, counsel for the plaintiffs, the case, by written consent of parties, having been tried before the court, requested the court to make the following ruling in the decision of this case, viz:

1st. That the Louisiana State Bank, by receiving for collection the note in question, became the agent of John Bird, the depositor and owner, and under its own invariable custom to have its notary to forward all notices of protest for all endorsers on paper sent down by its branch under cover to W. S. Pike, cashier, at Baton Rouge, and for the latter

to forward all such notices to the several endorsers, and is liable
35 to plaintiffs for any neglect or want of skill in sending the notice of protest to H. Doyal, the endorser.

2d. That the defendant having assumed the responsibility of giving legal notice of protest to H. Doyal, endorser, it is encumbent on the bank to show that such legal notice was given, and in default thereof is liable to the plaintiffs for the amount of said note, interest, and costs.

But the court refused to adopt either of said rulings, and instead thereof ruled that when the bank had placed the said note in the hands of its regular notary for protest, the bank, under the jurisprudence of Louisiana, had done all the law required, and it was not liable for any lack of notice to H. Doyal, endorser, or to his executors.

To which opinion by the court in refusing to adopt the rulings herein requested for the decision of the case, and to the said opinion and rulings adopted by the court, plaintiffs, by counsel, severally then and there excepted, and tendered to the court this their bill of exception for seal, signature, and allowance; which is done.

(Signed) E. H. DURELL, *Judge.*

36 *Plaintiffs' 2d bill of exception.—Filed April 1st, 1874.*

In the U. S. circuit court.

STEPHEN BIRD ET AL., EXECUTORS OF JOHN BIRD,
vs.
LOUISIANA STATE BANK. } No. 6044.

Be it remembered that on the trial of this cause, it having been proven by the certificate and by the testimony of E. G. Gottschalk, the notary of defendant, and there being no evidence to the contrary, that said C. A. F. Roundeau, cashier of defendant's bank, at the time he placed said note in the hands of said notary for protest, instructed him, said notary, to serve a duplicate notice of protest for H. Doyal, endorser, on Philip Rotchford, of the firm of Rotchford, Brown & Co., of New Orleans, the agent of said Doyal during his life-time, and that said notary did leave such notice with Mr. Brown, of said firm, and had he known the post-office address of said Doyal he would have sent a notice there;

It having been proven by the testimony of Wm. A. Elmore and
37 James W. Rotchford, and there being no evidence to the contrary, that said Henry Doyal, endorser, died on the 29th day of January, 1859, just one year and two days before said protest, and that Charles Moncure and John S. Minor, his sons-in-law, had at once qualified as executors of Henry Doyal and taken possession of four large and valuable sugar plantations belonging to his succession;

And it having been proven by the testimony of Rotchford and other witnesses, and there being no evidence to the contrary, that said Henry Doyal, as a very wealthy sugar-planter, with four large and valuable plantations, was well known throughout the State of Louisiana, and that any person, on enquiry at the office of Rotchford, Brown & Co., in New Orleans, would have learned his post-office address, and also of his death as soon as it occurred:

Counsel for the plaintiffs requested the court to make the following rulings, viz:

3rd. Had the bank shown they sent a notice of protest to H.
38 Doyal, at his post-office, at New River, (and they have not shown it,) it would not relieve them from liability, for the reason

said Doyal being dead, the notice must be sent to his executors in order to release the bank.

4th. That the death of H. Doyal put an end to the agency of Philip Rotchford, and the service of duplicate notice on said Rotchford, after the death of Doyal, was a nullity, and the bank made itself liable to plaintiffs by reason of its said wrong and careless instructions to said notary.

But the court refused to adopt either of said rulings, and instead thereof ruled that when the bank had placed said note in the hands of its regular notary for protest, the bank, under the jurisprudence of Louisiana, had done all the law required, and it was not liable for any lack of notice, and that said John Bird, the holder of said note, should have notified the bank of Doyal's death *of* the time said note was placed with the bank for collection.

To which opinion by the court in refusing to adopt the rulings
39 herein requested for the decision of the case, and to the said opinion and rulings adopted by the court, plaintiffs, by counsel, severally then and there excepted, and tendered to the court this their bill of exception for seal, signature, and allowance; which is done.

(Signed) E. H. DURELL,
Judge.

Plaintiffs' 3rd bill of exceptions.—Filed April 1st, 1874.

In the U. S. circuit court.

STEPHEN BIRD ET AL., EXECUTORS OF JOHN BIRD,
vs.
THE LOUISIANA STATE BANK. } No. 6044.

Be it remembered that on the trial of this cause, it having been proven by the testimony of Octave Terrio, clerk of the district court in and for the parish of Ascension, La., and by certified copy of the petition, certified copy of the note, and the protest of said note, and other authenticated documents, and there being no evidence to the contrary, that on the day of May, 1860, said John Bird, as the owner of the note in controversy, brought suit in said court against the executors of H.
40 Doyal, endorser, Doyal being dead, on said note; that said executors were duly cited, and, failing to answer, a judgment by default was regularly entered by said court and entered on the minutes thereof the 29th May, 1860, which judgment was not made final; and that subsequently, in the fall of 1862, when the Federal forces of the U. S. Army and Navy took possession of the town of Donaldsonville, the courthouse at that place, together with all the records of said court, including the note, and record of said suit, as aforesaid, were destroyed by fire;

It having been further shown and proven by the production of newspapers published at Donaldsonville, and in New Orleans, that the loss of said note was duly published in accordance with the requirement of the law of La.;

It having been further proven by the certified transcript of the suit, that on the 5th of June, 1866, said John Bird, as owner of said note in question, instituted suit on said note against the heirs and legal
41 representatives of said Henry Doyal, endorser, in the 6th district court of New Orleans, being No. 18267, on the docket of said

court, and that on December, 1868, there was a final judgment by the supreme court of Louisiana against said Bird and in favor of the heirs of Doyal, on the ground that there had been no legal notice of protest on said Henry Doyal or his legal representatives;

It having been further proven by the petition and marshal's return to the citation herein that this suit was instituted on the day of January, 1870, and the uncontradicted testimony of W. R. Stuart and W. S. Pike, introduced on the trial, tended to show that R. A. Stewart, the drawer of said note, had never been in a position to pay the same, nor had in his own right any property out of which said note could have been made:

Counsel for the plaintiffs requested the court to make the following rulings, viz:

5th. That it would have been a vain and unnecessary thing for the plaintiffs to have brought suit and obtained a judgment on said
42 note against the drawer thereof, said R. A. Stewart, before suing the bank for failing to give proper notice of protest to H. Doyal, endorser, as nothing could have been made out of said drawer.

6th. That the action against the bank, the defendants, for failing to do its duty as an agent, and in not giving the legal notice of the protest of said note to Henry Doyal and his executors, is prescribed only by the lapse of ten years from the date of their said laches.

But the court refused to adopt either of said rulings, and instead thereof ruled that plaintiffs should have kept said note from prescription as against said drawer, so as to be able to subrogate the bank to their rights against said drawer, and that this action was prescribed by the lapse of five years, and that this action could not be maintained; to which opinion by the court in refusing to adopt the rulings herein requested for the decision of the case, and to said opinion and rulings adopted by the court, plaintiffs, by counsel, severally then and
43 there excepted, and tendered to the court this their bill of exceptions for seal, signature, and allowance; which is done.

(Signed) E. H. DURELL, *Judge.*

Statement of facts by the court.—Filed April 1st, 1874.

EXECUTORS OF BIRD *vs.* LA. STATE BANK. } No. 6044.

The court finds the following facts in this case:

1st. The note sued upon was made by R. A. Stewart, at New Orleans, January 28th, 1859, payable to the order of H. Doyal, at twelve months, with eight per cent. interest from date, and payable at the Citizens' Bank of Louisiana.

2d. That said note was also endorsed A. Bird, who resided at Baton Rouge, State of Louisiana, and was the agent of John Bird, the owner of said note, said John Bird residing at Saint Louis.

3rd. That before the maturity of said note said A. Bird deposited the same in the branch of the Louisiana State Bank located at Baton
44 Rouge, with W. S. Pike, its cashier, for collection.

4th. That said Pike transmitted said note for collection to the mother bank at New Orleans, with his, the said Pike's, special endorsement thereon, to wit, "Pay to the order of C. A. F. Roundeau, esq., cashier. Wm. S. Pike, cashier."

5th. That C. A. F. Roundeau was at that time cashier of the Louisiana State Bank at New Orleans.

6th. That said C. A. F. Roundeau did, on the 31st day of January, 1860, place said note in the hands of E. G. Gottschalk, a duly qualified notary, residing in New Orleans, for protest for non-payment thereof, and that said notary did, on the same day and at the proper time and place, made demand of payment thereof, and did protest the same for non-payment thereof.

7th. That on the same day, to wit, on the 31st January, 1860, said notary deposited in the post-office at New Orleans, post-paid, notices of said protest for all the endorsers of said note, addressed to W. S. Pike, cashier, at Baton Rouge, Louisiana, and that said notary also left a duplicate notice of protest, addressed to H. Doyal, with S. Brown,
45 at the office of Philip Rotchford, in New Orleans, H. Doyal's former attorney in fact, as directed by C. A. F. Rondeau, cashier, and in conformity with instructions from the Louisiana State Bank.

8th. That Henry Doyal, endorser of said note, died on the 29th day of January, 1859, two days after having endorsed the same.

9th. That Henry Doyal, at the time of his death, resided on his plantation in the parish of Ascension, Louisiana, and that his post-office was New River, in said parish.

10th. That said Wm. S. Pike, cashier, does not remember to have received the notices of the protest of said note addressed to him, but that if he did receive the same, he is certain that he mailed the one intended for Henry Doyal on the day of its reception, addressed to said Doyal at New River.

11th. That Charles Moncure and John S. Minor qualified as the executors of said Doyal immediately after the decease of the latter,
46 but that neither of said executors ever received notice of the protest of said note.

12. That Philip Rotchford, of the firm of Rotchford, Brown & Co., New Orleans, had been the agent of said Doyal for many years, and up to the time of his, said Doyal's, death.

13th. That at the date of the protest of said note the death of Henry Doyal was unknown to said Wm. S. Pike, to said C. A. F. Roundeau, or to any other of the officers of the State Bank of Louisiana, or of its branch at Baton Rouge, as also to the notary, Gottschalk, who protested said note.

14th. That suit was brought upon said note against the executors of said Doyal in the proper court for bringing the same, being a court of the State of Louisiana having jurisdiction of the same; which said suit was finally determined on appeal by the supreme court of Louisiana, in favor of said executors, on the ground that there had been no legal notice of protest of said note given to the executors of said Doyal.

47 15th. That John Bird is dead, and that the plaintiff, Stephen Bird and Thompson Bird, are his legally qualified executors.

16th. That no suit was ever brought upon said note against R. A. Stewart, the maker of the same, and that as to said Stewart said note is prescribed.

(Signed) E. H. DURELL, *Judge.*

Correction made by the court.—Filed April 23rd, 1874.

EXECUTORS OF BIRD *vs.* LA. STATE BANK. } No. 6044.

The court corrects the following errors in its finding of facts:

1st. In the first fact found it should be stated that the note made by

R. A. Stewart, at New Orleans, January 28th, 1859, payable to the order of H. Doyal, was "also endorsed by said Doyal."

2d. In the second fact found A. Bird is erroneously said to have resided at Baton Rouge. "He resided at Manchac, Louisiana."

48 3rd. To the fifth fact found should be added the words "the defendant."

4th. To the tenth fact found should be added at the end, after the words addressed to said Doyal at New River, the words "if he then knew that to be his post-office."

5th. To the 16th fact found should be added, "that R. A. Stewart, the maker of the note sued upon, was wholly without credit as to the payment of any debt incurred by him, at the date of the notes falling due.

(Signed) E. H. DURELL, *Judge.*

Petition for a writ of error.—Filed April 25th, 1874.

STEPHEN BIRD ET AL., EXECUTORS OF JOHN Bird,
vs.
THE LOUISIANA STATE BANK. } 6044.

To the hon. the judges of the circuit court of the United States for the fifth circuit and district of Louisiana:

49 The petition of Stephen Bird and of Thompson Bird, testamentary executors of John Bird, deceased, respectfully represents, that a final judgment was rendered on the 11th and signed on the 19th of February, A. D. 1874, against your petitioners in the case of Stephen Bird and Thompson Bird, testamentary executors of John Bird, deceased, citizens of the State of Missouri, against the Louisiana State Bank, a corporation and citizen of the State of Louisiana, being No. 6044 on the docket of this court.

Your petitioners further represent, that they feel ag'rieved by said judgment, and desire to prosecute a writ of error from the same.

Wherefore your petitioners pray that a writ of error be allowed them from said judgment, returnable to the Supreme Court of the United States, on executing a bond, with good security, according to law, and for all general relief.

(Signed) RACE FOSTER & E. T. MERRICK,
Of Counsel for Plaintiffs.

50 *Order.*

A writ of error is allowed in this case, as prayed for, and according to law returnable to the Supreme Court of the United States on the second Monday of October next, the petitioners giving bond in the sum of five hundred dollars, with good and solvent security, and conditioned as the law directs.

New Orleans, April 25th, 1874.

(Signed) E. H. DURELL, *Judge.*

Bond for writ of error.—Filed April 25th, 1874.

Know all men by these presents, that we, Stephen Bird and Thompson Bird, executors of John Bird, as principal, and Samuel P. Greeves, as surety, are held and firmly bound unto F. A. Woolfley, clerk, or to the Louisiana State Bank, in the full and just sum of five hundred dollars, to be

paid to the said F. A. Woolfley, clerk, or to said Louisiana State
51 Bank, certain attorneys, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals and dated this 25th day of April, in the year of our Lord one thousand eight hundred and seventy-four.

Whereas lately at a circuit court of the United States, fifth judicial circuit, holding sessions in and for the district of Louisiana, in a suit depending in said circuit court, wherein said Stephen Bird and Thompson Bird, as executors of John Bird, were plaintiff, and the Louisiana State Bank was defendant, judgment was rendered against the said Stephen Bird et al., executors of John Bird, plaintiffs, and the said Stephen Bird and Thompson Bird, executors of John Bird, having obtained a writ of error, and filed a copy thereof in the clerk's office of the said circuit court to reverse the judgment in the aforesaid suit, and a c tation
52 directed to the said Louisiana State Bank, the defendants, citing and admonishing said bank to be and appear at a Supreme Court of the United States, to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such, that if the said Stephen Bird and Thompson Bird, executors of John Bird, shall prosecute their writ to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) STEPHEN BIRD & THOMPSON BIRD, [L. S.]
Executors of John Bird,
By RACE FOSTER & E. T. MERRICK, [L. S.]
Agents & Attorneys.
(Signed) SAML. P. GREEVES.

Sealed and delivered in the presence of—
Attest:
(Signed) G. W. RACE.

Approved.
(Signed) E. H. DURELL, *Judge.*

Samuel P. Greeves, being first duly sworn, says: I signed the within bond as security. I reside at the city of Baton Rouge, in Louisiana, and am worth the amount of this bond, over and above all my liabilities.
(Signed) SAML. P. GREEVES.

53 Sworn to and subscribed before me this 25th day of April, 1874.
(Signed) F. B. VINOT,
U. S. Commr.

54 UNITED STATES OF AMERICA:

Circuit court of the United States, fifth circuit, and district of Louisiana.

CLERK'S OFFICE.

I, Francis A. Woolfley, clerk of the circuit court of the United States for the fifth circuit and district of Louisiana, do hereby certify that the foregoing 53 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had on the trial of the case of Stephen Bird and Thompson Bird, testamentary executors of John Bird,

deceased, vs. The Louisiana State Bank, No. 6044 of the docket, so far as the same now remain of record or on file in said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 29th day of August, A. D. 1874.

[SEAL.] F. A. WOOLFLEY, *Clerk.*

I, E. H. Durell, United States judge for the district of Louisiana, do certify that Francis A. Woolfley, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and district of Louisiana, was, at the time of signing said certificate, and is now, the clerk of said court; that said certificate is in due form of law; and that full faith and credit are due to his official attestations as such clerk.

Given under my hand, at the city of New Orleans, in said district, this 29th day of August, A. D. 1874.

E. H. DURELL, *Judge.*

55 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States in and for the fifth circuit, and holding sessions for the district of Louisiana, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between Stephen Bird and Thompson Bird, citizens of the State of Missouri, and testamentary executors of John Bird, deceased, plaintiffs, and the Louisiana State Bank, a corporation under the laws of Louisiana, and a citizen of Louisiana, defendant, being No. 6044 on the docket of said court, a manifest error hath happened, to the great damage of the said Stephen Bird and Thompson Bird, as testamentary executory executors of the last will of John Bird, deceased, as by their complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the said Supreme Court of the United States, this 25th day of April, in the year of our Lord one thousand eight hundred and seventy .

[SEAL.] F. A. WOOLFLEY,
Clerk of the United States Circuit Court
for the District of Louisiana.

(Indorsed:) United States circuit court. No. 6044. Stephen Bird et al., exs. of John Bird, plffs. in error, versus The Louisiana State Bank, defendant in error. Writ of error. Filed April 25th, 1874. F. B. Vinot, D'y clk.

56 THE UNITED STATES OF AMERICA:

Circuit court of the United States, district of Louisiana.

The President of the United States to the Louisiana State Bank, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the fifth circuit and district of Louisiana, wherein Stephen Bird and Thompson Bird, testamentary executors of John Bird, deceased, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, this 27th day of April, in the year of our Lord one thousand eight hundred and seventy-four.

E. H. DURELL, *Judge.*

57 (Indorsed:) United States circuit court. No. 6044. Stephen Bird and Thompson Bird, executors of John Bird, plaintiffs in error, vs. Louisiana State Bank, defendant in error. Citation.

Marshal's return.

Received Apr. 28, 1874, by the U. S. marshal, and, on the 13th day of May, of same year, served a copy of within citation, &c., on the Louisiana State Bank, named herein, by handing the same to S. H. Kennedy, the president of said bank, in person.

New Orleans, May 13th, 1874.

S. W. REED,
D'y U. S. Marshal.

On this 13th day of May, 1874, personally appeared before me, the subscriber, S. W. Reed, deputy U. S. marshal, and makes oath that he served a copy of the within citation, as stated in his official return hereon.

S. W. REED,
D'y U. S. Marshal.

Sworn to and subscribed before me this 13th day of May, 1874.

F. B. VINOT,
U. S. Commr.

(Indorsement on cover:) No. 258. Stephen Bird and Thompson Bird, exors. of John Bird, decd., plaintiffs in error, vs. The Louisiana State Bank. Louisiana C. C. U. S. Filed 22d September, 1874.

Supreme Court of the United States.

DECEMBER TERM 1875, No. 258.

STEPHEN BIRD AND THOMPSON BIRD,
EXECUTORS OF JOHN BIRD, DECEASED,
PLAINTIFFS IN ERROR,

versus

THE LOUISIANA STATE BANK,
DEFENDANT IN ERROR.

Statement, Assignment of Errors, and Argument for Plaintiffs in Error.

I. STATEMENT OR ABSTRACT OF THE CASE.

On the 28th January, 1859, R. A. Stewart drew his promissory note, payable at the Citizens' Bank of Louisiana, twelve months after date, to the order of and endorsed in blank by Henry Doyal, for the sum of five thousand seven hundred dollars, ($5,700,) bearing eight per cent. interest from its date until paid.

Said note was negotiated at once to John Bird of

Missouri, who, soon thereafter, deposited it for collection in the Branch of the Louisiana State Bank at Baton Rouge, La., and was by said Branch Bank, before its maturity, sent to the mother Bank, the Louisiana State Bank in New Orleans, where the drawer resided, and where it was payable, for collection.

At maturity, this note was presented for payment and protested for non-payment by E. G. Gottschalk, the notary employed by said Bank, to whom the cashier of said Bank, C. A. F. Rondeau, gave special instructions to serve a duplicate notice on Henry Doyal, the endorser, by leaving the same with Philip Rotchford, in New Orleans, whom he represented to be the agent and attorney in fact of said Doyal. And said notary sent the notice for said Doyal to Wm. S. Pike, the cashier of said Branch Bank at Baton Rouge, which was never served on the legal representatives of said Doyal, who had died a few days after he endorsed the note at his residence on one of his large plantations at New River, in the parish of Ascension, La., where his succession had been oponed, and where one of his executors and heirs then resided.

See Petition, Record, pages 1 and 2.

The facts, found at pages 15 to 17, are—

That said R. A. Stewart, the drawer of said note, from its date to the present time, never had the means to pay, nor the property out of which said note could have been made, and any suit on said note against him would have resulted in costs, and have been vain and useless. Record, page 15.

That immediately after said note was protested, suit thereon was brought by John Bird, the owner, against the executors of Henry Doyal, the endorser, in the District Court for the Parish of Ascension, La., and before its trial the whole record was destroyed by the Federal army and navy, when, in 1862, they took possession of Donaldsonville, La. Record, page 14.

That when the rebellion was over and the civil courts were re-opened, said John Bird, as owner of said note, having duly advertised its loss according to the law of Louisiana, brought suit thereon against the executors and heirs of Henry Doyal, the endorser, in the Sixth District Court of New Orleans, and the Supreme Court of Louisiana rendered final judgment against him, said Bird, and in favor of the heirs of Doyal, on the ground that there had been no legal notice of the protest served on said Henry Doyal or his legal representatives. Record, page 15.

That then this suit was brought against the Louisiana State Bank, to hold it liable for the amount of said note, on the ground that it failed to give notice of the protest of said note to the executors of Henry Doyal, the endorser, and only party to said note ever worth any property. Record, page 14.

To this action the Bank filed an exception to the capacity of plaintiffs. Record, page 3.

After a hearing, said exception was overruled, with costs. Page 7.

Thereupon, defendant filed an answer of general denial. Page 8.

Subsequently, defendant filed the plea of prescription of one and five years. Page 8.

These exceptions were consolidated in the suit, by order of Court. Page 9.

After a jury had been empannelled, it was waived, and the case was tried before the judge. Page 9.

The judgment was for defendant. Page 10.

And the plaintiffs took a writ of error to this Court. Page 17.

II. Assignment of Errors.

1st. *First Assignment of Error.* The Court erred in refusing to make the following ruling in the decisio n of this case, as requested by counsel for plaintiffs in error, viz.:

1st. "That the Louisiana State Bank, by receiving for collection the note in question, became the agent of John Bird, the depositor and owner, and under its own invariable custom to have its own notary to forward all notices of protest for all endorsers, on paper sent down by its Branch, under cover to W. S. Pike, cashier, at Baton Rouge, and for the latter to forward all such notices to the several endorsers, and is liable to plaintiffs for any neglect or want of skill in sending the notice of protest to Henry Doyal, the endorser." Printed Record, page 12.

"But the Court refused to adopt said ruling, and instead thereof, ruled that when the Bank had placed the note in the hands of the regular notary for protest, the

Bank, under the jurisprudence of Louisiana, had done all the law requires, and it was not liable for any lack of notice to H Doyal, endorser, or to his executors."

Printed Record, page 13.

This ruling by the Court is erroneous, in assuming that the Bank merely placed said note in the hands of its regular notary for protest without instructions, and consequently is not liable for any errors on behalf of said notary; whereas, said Bank placed said note in the hands of its notary for protest under two instructions, which make it responsible, viz:

1st. The general instructions, which had become "*the invariable custom and practice* between the Louisiana State Bank, its branch at Baton Rouge, and the notary in New Orleans, for the latter, Gottschalk, notary, in all cases of protesting notes sent by the Branch Bank at Baton Rouge, to send all notices of protest under cover addressed to W. S. Pike, cashier, at Baton Rouge; and it was, under such invariable custom of the Bank, the duty of said Pike, cashier, to serve all notices of protest on all prior endorsers whom the Bank desired to hold liable." These facts are established by the testimony of said Pike, cashier, and by said Gottschalk, notary, and there is no testimony to the contrary. Printed Record, page 12, in 1st Bill of Exceptions.

In accordance with this custom, the notary says he sent a notice of protest for H. Doyal, the endorser, under cover to W. S. Pike, cashier of the Branch Bank at Baton Rouge. Original Record page 38.

And it has not been shown by the testimony of said Pike, cashier, nor by any other testimony, that said notice of protest for Henry Doyal was ever sent to said Doyal at his post-office at New River. Original Record, page 33.

2d. The special instructions given by Rondeau, cashier of defendants' Bank, to said notary at the time he placed said note in the hands of Gottschalk for protest, to serve a duplicate notice of protest for H. Doyal, endorser, on Philip Rotchford, of the firm of Rotchford Brown & Co. of New Orleans, the agent of said Doyal during his life-time, and that said notary did leave such notice with Mr. Brown, of said firm, and had the notary known the post-office address of said Doyal, he would have sent a notice there.

These facts are established by the certificate and evidence of said Gottschalk, notary of defendant, and there is no testimony to the contrary. Printed Record page 13, beginning of 2d Bill of Exceptions.

It is shown in the next paragraph of this same bill of exception, that the endorser, Henry Doyal, whom all parties desired to hold, died on the 29th day of January, 1859, just one year and two days before said protest, and that John Moncure and John S. Minor, his sons-in-law, had at once qualified as executors of Henry Doyal, and taken possession of four large and valuable sugar plantations belonging to said succession. And said Doyal being a very wealthy man, was generally known, and his post-office address and his death would

have been learned at the office of Rotchford, Brown & Co., where the notice of protest was left, had inquiry been made; which would have been made by the notary, but for the instructions of the Bank to leave it there. Original Record, pages 36 and 37.

2d. Second Assignment of Error. The court erred in refusing to make the following ruling in the decision of this cause, as requested by counsel for plaintiffs in error, viz.:

"2d. That the defendant having assumed the responsibility of giving legal notice of protest to H. Doyal, endorser, it is incumbent on the Bank to show that such legal notice was given, and in default thereof, it is liable to the plaintiffs for the amount of said note, interest and costs." Original Record, page 35.

"But the court refused to adopt said ruling, and instead thereof, ruled that when the Bank had placed said note in the hands of its regular notary for protest, the Bank, under the jurisprudence of Louisiana, had done all the law required, and it was not liable for any lack of notice to H. Doyal, endorser, or to his executors." Original Record, page 35.

This ruling of the court is erroneous, because of the same facts and circumstances just detailed in showing the error in the ruling under the first assignment of error. The Bank, by its *invariable custom* with its branch and notary, to give the notices through Pike, cashier, relieved the notary from all responsibility imposed on him by law, and took all that upon itself.

And it is this self-imposed or assumed duty that changes the responsibility of giving notice of protest to the endorser from the notary to the Bank.

3d. THIRD ASSIGNMENT OF ERROR. The court erred in refusing to make the following ruling in the decision of this cause, as requested by counsel for plaintiffs in error, viz.:

"3d. Had the Bank shown it sent a notice of protest to H. Doyal, at his post-office at New River, (and it has not shown it,) it would not relieve it from liability, for the reason said Doyal being dead, the notice must be sent to his executors, in order to release the Bank." Original Record, page 38.

"But the court refused to adopt said ruling, and instead thereof, ruled that when said Bank had placed said note in the hands of its regular notary for protest, the Bank, under the jurisprudence of Louisiana, had done all the law required, and it was not liable for any lack of notice, and that said John Bird, the holder of said note, should have notified the Bank of Doyal's death at the time said note was placed in the hands of the Bank for collection."

Original Record, page 38; Printed Record, page 14.

This ruling by the court is erroneous, because of all the facts heretofore set up under the 1st and 2d assignments of error; because Henry Doyal, the endorser, resided in the parish of Ascension, La., and his post-office was New River, in said Parish.

See 9th fact found, Printed Record, page 16.

That said Doyal, endorser, died on the 29th of January, 1859, two days after he endorsed said note.

See 8th fact found, Printed Record, page 16.

That Moncure and Minor, immediately after the death of Doyal, qualified as his executors, and never received any notice of the protest of said note.

See 11th fact found, Printed Record, page 16.

That these plaintiffs, in their capacity of executors of John Bird, instituted suit in the Sixth District Court of New Orleans, being No. 18.267 on the docket thereof, on said note against the heirs and legal representatives of said Henry Doyal, endorser, and there was a final jadgment by the Supreme Court of Louisiana against said plaintiffs and in favor of the heirs of Doyal, on the ground there had been *no legal notice of protest on Henry Doyal, or his legal representatives.*

See 14th fact found, Printed Record, page 16; Original Record, pages 41 and 42.

That W. S Pike, the cashier of the Branch Bank, at Baton Rouge, to whom the notice of protest was sent, for H. Doyal, endorser, under the universal custom of the mother Bank with the notary, does not remember to have received the notices of protest of the note addressed to him, but that if he did receive the same, he is certain he mailed the one intended for Henry Doyal on the day of its reception, addressed to said Doyal at New River, if he then knew that to be his post-office."

See 10th fact found, Printed Record, page 16, and the correction thereto, page 17; Original Record, pages 48 and 33.

For this invariable custom of the Bank to have its notary to send all notices of protest for endorsers under cover to W. S. Pike, cashier, at Baton Rouge, see Original Record, page 32.

The complaint against the Bank is not for any laches of the notary, for he did all the Bank required of him; but is for laches of the Bank in failing to give legal notice after having assumed to do it.

"4rh. FOURTH ASSIGNMENT OF ERROR. The court erred in refusing to make the following ruling in the decision of this cause, as requested by counsel for plaintiffs in error, viz.:

4th. That the death of H. Doyal put an end to the agency of Philip Rotchford, and the service of duplicate notice on said Rotchford, after the death of Doyal, was a nullity, and the Bank made itself liable to plaintiffs by reason of its said wrong and careless instructions to said notary." Printed Proceedings, page 14.

"But the court refused to adopt said ruling, and instead thereof, ruled that when the Bank had placed said note in the hands of the regular notary for protest, the Bank, under the jurisprudence of Louisiana, had done all the law required, and that it was not liable for any lack of notice, and that said John Bird, the holder of said note, should have notified the Bank of Doyal's

death at the time said note was placed with the Bank for collection." Original Record, page 38; Printed Record. page 14.

This ruling by the court is erroneous, because of all the facts and circumstances set up under the third Assignment of Error; because said notice of protest was served on Rotchford as the agent of Doyal more than one year after his death, not by the notary in the discharge of what he conceived to be his duty, but by the instructions of Rondeau, in his capacity of cashier of defendant's bank.

See 7th fact found, Printed Record, page 16; also, Original Record, page 36.

5th. Fifth Assignment of Error. The court erred in refusing to make the following ruling in the decision of this cause, as requested by counsel for plaintiffs' in error, viz:

"5th. That it would have been a vain and unnecessary thing for the plaintiffs to have brought suit, and obtained judgment on said note against the drawer thereof, said R. A. Stewart, before sueing the bank for failing to give proper notice of protest to H. Doyal, endorser, as nothing could have been made out of said drawer." Printed Record, page 15.

"But the court refused to adopt said ruling, and instead thereof, ruled that plaintiffs should have kept said note from prescription as against said drawer, so as to be able to subrogate the Bank to their rights against

said drawer, and that this action was prescribed by the lapse of *five years*, and that this action could not be maintained." Printed Proceedings, page 15.

This ruling by the court is erroneous, because the law never requires a vain and useless thing to be done. R. A. Stewart the drawer of said note was at all times a mere man of straw—totally without means and property with which to pay said note. Original Record, page 41; Printed Record, page 15. See, also, 5th correction to the 16tn fact found, Printed Record, page 17.

6th. SIXTH ASSIGNMENT OF ERROR. The court erred in refusing to make thefollowing ruling in the decision of this cause, as requested by counsel for plaintiffs in error, viz:

"6th. That the action against the Bank, the defendants, for failing to do its duty as an agent, and in not giving the legal notice of the protest of said note, to Henry Doyal and his executors, is prescribed only by the lapse of *ten years*, from the date of their said laches." Printed Record, page 15; Original Record, page 42.

"But the court refused to adopt said ruling, and instead thereof, ruled that the plaintiffs should have kept said note from prescription as against said drawer, so as to be able to subrogate the Bank to their rights against said drawer, and that this action was prescribed by the lapse of *five years*, and that this action could not be maintained." Printed Record, page 15; Original Record, page 42.

This ruling by the court is erroneous. for the reason it is against the law, which makes prescription in such a case *ten years* instead of five, as ruled.

III. A BRIEF OF THE ARGUMENT.

FIRST. *On the First Assignment of Error.*

1st. It seems to be well settled in law. that the Louisiana State Bank, by receiving for collection the note in question, and assuming to give notice of protest to the endorser, became the agent of John Bird, the owner and depositor and as such is clearly liable for any neglect or want of skill on the part of any of its officers in not sending the notice of protest of said note to Henry Doyal, the endorser.

C. C. 2315 (2294) and 2316 (2295).

2 L. R. 416, Pritchard vs. Louisiana State Bank.

16 L. R. 567, McCulloch vs. Commercial Bank.

8 Wall. 641, Chicopee Bank vs. Philadelphia Bank.

47 N. Y. R. 573, Ayrault vs. The Pacific Bank.

Smith's Mercantile Law, page 145 and note.

Chitty on Bills, page 332 and note (I).

Angell on Limitations, page 122, No. 3.

Sherman & Redfield on Negligence, page 267, §§ 239, 241, 243, 4 and 5.

Merse on Banks and Banking, pages 357, 365 and 366.

In 2 Louisiana R. 416, Pritchard et al. vs. Louisiana State Bank, it was held, that where the Bank undertakes the collection of a note, it becomes the agent

of the depositor, and if its notary neglects to give proper notice to the endorser, and in consequence he is exonerated, the Bank is liable to pay the amount of the note to the depositor.

In Montillet vs. Bank of the United States, 1 Martin's N. S. 365, the Bank was held liable for the amount of a note deposited for collection, because of the failure to give proper notice of protest to the endorser.

In Canonge vs. Louisana State Bank, 3 Martin's N. S. 344, the Bank was held liable for a defective notice of protest.

In McCullock vs. Commercial Bank, 16 Louisiana R. 567, it was held, that the Bank, by taking the note for collection, became the mandatory or agent of the holder or depositor.

In Fabens vs. The Mercantile Bank, 23 Pickering R. 330, it was held, that where a note was deposited in one bank, to be sent to another bank for collection, the latter was liable to the depositor for not giving due notice of its dishonor. In the case at bar, the bank receiving the note, and the one to which it was transmitted for collection, are the same—the former being merely a branch of the latter.

3 Cowen's R. 663, Bank of Utica vs. Smedes.

In Ayrault vs. Pacific Bank, 47, New York R. 573, it was laid down that—By the receipt of negotiable paper for collection, the bank or bankers receiving it undertakes that the necessary means shall be taken to charge the drawer, endorser and other parties upon de-

fault or refusal to pay or accept. A bank receiving a bill or promissory note for collection, whether payable at its counter or elsewhere, is liable for any neglect of duty occurring in its collection, by which any of the parties are discharged, whether of the officers and immediate servants, or other agents of the Bank, or its correspondents, or agents employed by such correspondents."

In Chicopee Bank vs. Philadelphia Bank, 8 Wall. R. 641, it was held that, if the Bank failed to do all necessary to hold all prior parties on the note, it was guilty of negligence, and is liable to the depositor for the amount of the note, even though the holder himself has not been entirely thoughtful, active and vigilant as he might have been.

Surely these several authorities clearly establish this first legal proposition of the agency and liability of the Bank, for any neglect on the part of its officers, etc.

2d. The defendants' reply to this clear proposition is, that when the Bank placed said note in the hands of its notary for protest, it had done all the law required, and was not liable for any lack of notice to Doyal or his executors.

By reference to the facts, it will appear that this reply begs the question.

The plaintiffs do not seek to hold the Bank liable for any neglect on the part of the notary, to send notice of protest to Doyal's executors, for he was released from that duty by the Bank, under the custom between the

Bank and the notary, the Bank was to serve all notices which otherwise would have devolved on the notary.

"*It having been further proven by the testimony of W. S. Pike, cashier, and by the testimony of E. G. Gottschalk, then and for many years the regular and only notary public of the defendants, and there being no testimony to the contrary, that it was the invariable custom and practice between the Louisiana State Bank its branch at Baton Rouge and its notary in New Orleans. for the latter, Gottschalk notary, in all cases of protesting notes sent from the branch bank at Baton Rouge, to send all notices of protest under cover addressed to W. S. Pike cashier, at Baton Rouge; and it was, under said invariable custom of the Bank, the duty of said Pike, cashier, to serve all notices of protest on all prior endorsers whom the Bank desired to hold responsible.*" See Original Record, page 32, being a portion of the 1st Bill of Exception now under consideration.

This quotation establishes a custom created by defendants which shifts the duty and responsibility of giving notice of protest to the endorser, Doyal, from the notary to Pike, cashier of the branch bank.

3d. The next paragraph to the foregoing shows that, pursuant to said invariable custom, the notary did forward notice of protest to said Pike, cashier, at Baton Rouge, for him to have served on said Doyal, endorser. Original Record, page 33.

4th. And here comes in the liability of the Bank, in not giving the notice of protest to the endorser, as it had assumed and undertaken to do.

The fact is thus stated in the bill: "*And it has not been shown by the testimony of W. S. Pike cashier, nor by any other testimony, that he or any other person ever forwarded said notice of protest for Henry Doyal to him at his post-office at New River.*" Original Record, page 33.

Pike's testimony is, that "he has no recollection of ever having received the notices of protest in this case; that if he did receive them, and if at that time he knew the post-office address of H. Doyal to be at New River. he has no doubt he sent the notice there. But he is not certain that at that time he knew the post-office of H. Doyal to be at New River; thinks he did." Original Record, pages 33 and 34.

This doubtful evidence on this vital point is not sufficient to exonerate the Bank from its self imposed duty of giving notice of protest to all persons sought to be held liable as endorsers.

In Hoff vs. Baldwin, 12 Martin R. 699 it was held that the oath of a notary, that he had protested the draft and that he was generally in the habit of giving notice on all protested notes and bills, and presumes that he gave notice to the defendant, as he was requested to be very particular about it; and that his habit was to put notices into the post-office, to be sent off by the first mail, but having a great deal of protesting to do that summer, he has no recollection about notifying defendant, *is no sufficient proof of notice.*"

The facts are almost identical in these two cases, and do not establish a legal notice to Doyal, endorser.

And when we add to this hypothetical and vague statement of Pike, the positive testimony of Charles Moncure and John S. Minor, the sons-in-law and executors of H. Doyal, whose post-office was also New River, and whose residence was at the homestead of Doyal, who swear that they never received notice of the protest for Doyal, we have made certain that the Bank never gave any notice of protest for Doyal, as it had agreed to and was legally bound to do. And this establishes the liability of the Bank beyond all doubt.

SECOND. *On the Second Assignment of Error.*

1st. In the discussion on the first assignment of error, it has been abundantly shown, by the testimony of the cashiers and notary of the Bank, that they had established an invariable custom among themselves, changing the usual and ordinary practice and liability of the notary from him to the Bank; and that this assumption on behalf of the Bank to give the notice of protest to Henry Doyal, endorser, was never given by Pike, cashier, or by any other person.

2d. By way of further showing that the Bank alone controlled the whole question of protest and notice thereof, it may be seen that said Gottschalk, notary, by directions of Rondeau, cashier of defendant's Bank, gave notice of protest to Philip Rotchford, formerly the agent of Doyal. But this was done more than one year after the termination of his agency by the death of said Doyal, and is therefore a mere nullity. Original

Record, page 36. See, also, page 45, for 7th and 8th facts found.

Thus it has been shown that the notary had, under the general instructions and invariable custom of the Bank, to send notice for Doyal, endorser, under cover to Pike, cashier, at Baton Rouge; and by special instructions from Rondeau, cashier, to leave a duplicate notice with Rotchford, the former agent of Doyal. In all this, there was no discretion left to the notary in the discharge of his duties.

Gottschalk, after saying "he did leave the notice with Mr. Brown, of said firm" (of Rotchford, Brown & Co.) said, "*and had he known the post-office address of said Doyal, he would have sent a notice there.*" Original Record, page 36.

Had the Bank required the notary to use any diligence or discretion in serving notice of protest on Doyal, he would have made inquiry at the office of Rotchford, Brown & Co., when leaving the notice there, for the post-office address of Doyal, and *there* would have learned that Doyal was dead; his succession had been opened; his sons-in-law, Charles Moncure and John S. Minor, had qualified as executors, and that one of them resided in the late home of said Doyal and his post-office was New River, Parish of Ascension, Louisiana.

See 11th fact found, Printed Record page 16; also, Original Record, page 37.

But the Bank, instead of saying to its notary, Gotts-

chalk, that Rotchford, of the firm of Rotchford, Brown & Co., was the agent of Doyal, go there, find Doyal's address and send him a notice of protest, gave positive instructions to the notary to leave the notice of protest there—no inquiry to be made, and no further act to be done.

It cannot avail the Bank to say its cashier, and its notary did not know the post-office of Doyal, and that, therefore, notice was not given—because Rondeau, the cashier of the mother Bank, defendant, knew that Rotchford, of New Orleans, had been the agent of Doyal, and instructed his notary to leave a notice of protest there, and no sane mind could doubt the fact, that Rotchford, the agent, knew the post-office of his principal, Doyal. Therefore, had Rondeau, cashier, desired Gottschalk, notary, to relieve the Bank from any of its assumed responsibility in giving notice of the protest to Doyal, he would have said, go to Rotchford, the agent, learn the post-office of Doyal, and send him notice of protest there: this would have required no more time and no more trouble, and would have resulted in the giving of legal notice of protest to the executors of Doyal, and the making the amount of the note out of Doyal's large estate. As the Bank did not use the means at hand to obtain the necessary knowledge to enable it to discharge its assumed duty of giving notice of protest, and has not shown that any such notice was ever given to Doyal or his executors, the Bank is clearly liable to plaintiffs for the amount of the note, as claimed in their petition.

2 L. R. 416, Pritchard et al. vs. La. State Bank.
1 Martin's N. S. 365, Montillet vs. Bank of the United States.
3 Martin's N. S 344, Canonge vs. La. State Bank.
16 L. R. 567, Mc Cullock vs. Commercial Bank.
23 Pickering R. 330, Fabens vs. Mercantile Bank.
3 Cowen R. 663, Bank of Utica vs. Smedes.
47 N. Y. R. 573, Ayrault vs. Pacific Bank.
8 Wall. R. 641, Chicopee Bank vs. Philadelphia Bank.

THIRD. *On the Third Assignment of Error.*

1st. Had the Bank shown by the testimony of Pike, cashier, or otherwise, that notice of protest for Henry Doyal, endorser, was sent to his post-office, New River, Ascension Parish, La. (and it has not been shown) that would not relieve the Bank from liability, *for the reason that Doyal died more than one year before the protest of the note in question,* and Moncure and Minor had been qualified as his executors. Therefore, the notice of protest shoul have been sent to one of the executors. Original Record, page 37.

In the New Orleans & Carrollton Rail Road Co. vs. Kerr et al. 9 R. R. 122, the Supreme Court of Louisiana, held, "*that the executor of a deceased endorser is the proper person on whom to serve a notice of protest.*"

In the case of the Bank of Louisiana vs Smith et als. 4 R. R. 276, it was held that where the endorser of a note has died, notice of protest must be sent to his le-

gal representatives. *A notice addressed to the deceased by name, will be bad. And the Bank must show that a certain degree of diligence was used to ascertain the residence of the executor,* etc.

Had the Bank in the case at bar used any such diligence as is required by this decision, the death of Doyal and the residence of his executors would have been learned from Rotchford the former agent of Doyal.

But concede, under the authority in case of Louisiana State Bank vs. Dumartrait et al. 4 Ann. R. 483, that in case the notice of protest addressed to Henry Doyal, endorser, reached the hands of one of his executors, (his death being known,) his estate would be liable, and the Bank relieved from its liability, then the Bank is not benefited nor relieved from liability, as it is clearly established that no notice of protest ever reached his executors. See 11th fact found, Printed Record, page 16, viz:

"That Charles Moncure and John S. Minor qualified as the executors of said Doyal, immediately after the decease of the latter, *but that neither of said executors ever received notice of the protest of said note.*"

FOURTH. *On the Fourth Assignment of Error.*

1st. It is but a clear legal proposition, that the death of Henry Doyal put an end to the agency of Philip Rotchford, and service of notice of protest on said Rotchford, after the death of Doyal, was a nullity, and the Bank made itself liable to plaintiffs by reason

of its said wrong and careless instructions to said notary, to serve notice for Doyal on said Rotchford, long after the death of Doyal. See Original Record, page 38; Printed Record, page 14.

C. C. 3027 (2996).

20 Ann. R. 543, Bird vs. Doyal.

Story on Agency, § 488.

2d. Nor will the fact that John Bird, when he deposited said note for collection in the branch bank at Baton Rouge, did not inform said Bank of the death of Henry Doyal the endorser, relieve the Bank from its liability resulting from its fault.

Let it be remembered, that John Bird resided in the State of Missouri, and that A. Bird, who made the deposit of said note in the branch bank, resided at Manchac, La. an out of the way and obscure place, remote from Baton Rouge.

See *second fact found*, as *corrected.*

Printed Record, pages 15 and 17.

Consequently, neither of the Birds were in a position to know either the death or post-office of Doyal, whilst the Bank knew that Rotchford, at its very door, was the agent of Doyal during his life, and from him all information could be obtained for giving legal notice of protest; and in fact the Bank sent its notary to that very office to leave notice of protest, instead of there learning the needed facts to enable him to give a legal notice.

In Canonge vs. Louisiana State Bank, 7 N. S. R. 585, it was held, that, the notary must use due dili-

gence to discover the residence of the endorser, that notice of protest might be given, and until the Bank showed that the notice had been received by the endorser, for until then it is not given,

In Wilson vs. Wall, 6, Wall. R. 90, this Court held, that a party is bound to know that which he may know by the use of proper diligence, etc.

By the application of this principle, the Bank knew the post-office of Doyal, his death, the qualification and residence of his executors, and should have instructed the notary accordingly.

But in the case at bar, so far from the Bank having shown notice of protest to Doyal, the plaintiffs have shown there never was any such notice of protest sent, even to Doyal.

It is clear the Bank assumed to give the notice of protest, and has shown no notice nor any diligence to ascertain the necessary facts from the agent of Doyal, to enable it to discharge its said duty of giving legal notice to Doyal's executors, and must be held liable for the loss resulting from its *laches*.

True, where paper is handed to the notary of a bank without instructions or custom of the bank to govern his conduct, the notary himself becomes responsible for his negligence, and the holder of the note has his remedy against the notary. But when the bank gives the notary special instructions which he follows, it is manifest that the holder loses his remedy against the notary and the bank cannot [to use defendant's misap-

plied terms] subrogate the holder to the action against the notary.

Under such a custom as existed between the Bank, its branch and the notary, for the notary to send all notices for endorsers under cover to Pike, cashier, at Baton Rouge, and for the latter to send them to the endorsers; and under such instructions as were given by Rondeau, cashier, to the notary, to leave duplicate notice for Doyal with Rotchford one year after Doyal's death, it is clear that the Bank, and not its notary, is the party to make reparation resulting directly from its fault.

It is no longer an open question, whether or not plaintiffs have suffered damages, and how much from the *laches* of the Bank in not giving notice of protest to Doyal or his executors.

This question was decided in a direct action brought by John Bird against the heirs and executors of Henry Doyal, for the amount of this same note. 20 Ann. R. 542.

The Supreme Court of Louisiana held the heirs of Doyal exonerated from liability on said note, because there had been no notice of protest served on the executors. The Court said. "*We consider it well settled, that the holder of a bill or note is required to show the use of reasonable diligence to find out the residence of the endorser when it is unknown to him.*" The Court further said:

"*The evidence in the record satisfies us that the exercise*

of a moderate degree of diligence would have put the notary in possession of the fact of the decease of the endorser long before, and the names and residence of his executors."

Here we have a final judgment by the Supreme Court of Louisiana, deciding these questions against the Bank, that it neither gave notice of protest to Doyal nor used proper diligence at command to do so.

Nor will it avail the Bank to say, that as it was no party to that suit, it is not bound by its decision. In Miranda vs. City Bank of New Orleans, 6 L. R. 744, it was held, that "*a decision* (under similar circumstances) *was binding on the Bank, unless it show that sufficient legal notice was given to the endorser.*"

And as no such showing has been made in the case at bar, the Bank is bound by that decision, and is liable, as claimed, for the damages sustained by the plaintiffs by its fault in not using the means at its command, which would have enabled it to give proper legal notice of the protest to the executors of Doyal.

The Bank and all its officers knew that all this information could have been obtained from Rotchford, and yet no enquiry was made to ascertain the facts, although the notary, by instructions, left a notice there. These facts clearly show a want of proper diligence on the part of the Bank, and makes it liable for the loss to plaintiffs.

FIFTH. *On the Fifth Assignment of Error.*

1st. That it would have been a vain and unneces-

sary thing for the plaintiffs to have first obtained judgment on said note against R. A. Stewart, the drawer, before suing the Bank for failure to give notice of protest to said Doyal, endorser, for the reason it had been shown, by "the uncontradicted testimony of W. S. Pike, cashier, and by W. R. Stuart, that the drawer of said note, R. A. Stewart, had never been in a position to pay said note, nor had he in his own right any property out of which said note could have been made."

Original Record, page 41.

The doctrine that if the holder, by his conduct, releases the drawer of a note, that will release all subsequent parties to the note, is based on the right accorded to every party whose name is on the note, on paying it, to be subrogated to all the rights of all prior parties to that note.

This flows directly from the commercial law on this subject.

Story on Promissory Notes, §§ 423, 424.

But this doctrine applies only to persons whose names are on the note, and whose liability results from their signatures.

And does not apply to a case like this.

Here the Bank is to be considered as the *agent* of Bird, its customer, and is bound to indemnify him for all damages resulting from its *laches;* and its liability is not in any manner dependent upon the ability of plaintiffs to subrogate it to their rights against the drawer or any other party, but depends solely on the

fact that they have suffered loss and damage by the Bank not serving notice of protest on Doyal, the endorser, as it agreed to do.

Story on Agency, §§ 217c., 219, 223, 224, 229, and notes.

Nor does the subrogation provided by the Civil Code of Louisiana meet this case. That is either *conventional*, the result of a contract, or *legal*, and takes place of right in only four classes of cases:

"1st. For the benefit of him who being himself a creditor, pays another creditor, whose claim is preferable to his by reason of his privileges or mortgages."

"2d. For the benefit of the purchaser of any immovable property who employs the price of his purchase in paying the creditors to whom his property was mortgaged."

3d. "For the benefit of him, who being bound with others, or for others, for the payment of the debt, had an interest in discharging it."

"4th. For the benefit of the beneficiary heir, who has paid with his own funds the debts of the succession."

C. C. 2160, (2156) and 2161, (2157.)

These are the only cases in which legal subrogation takes place under the law of Louisiana; and it is clear that a claim like this for damages resulting from neglecting to give notice of protest to the endorser, the only solvent party to the note, after having assumed the responsibility of doing so, does not come within the

provisions of this law, nor yet within the scope of the law of agency. And there is no subrogation in the case.

Nor is there any *subrogation* in a case like this under the commercial law.

Story on Promissory Notes, § 453, lays it down that, "*Whoever, therefore, not being a party to the note, does undertake, upon the dishonor thereof, to pay it for the honor of the makers or endorsers, does so at his peril; and does not, by the general commercial law, thereby acquire any riyht to payment from any of the antecedent parties, for whose honor he paid it. etc.* In this respect notes differ entirely from bills of exchange. In the latter case one paying super protest has his legal rights for reimbursement, whilst in the former case there is no provision of law, civil or commercial, for the reimbursement of any one, who pays a note that his name is not upon.

The Bank is sued for damages, resulting from its gross fault and negligence, etc., and not because of any endorsement on the note. See Petition, Original Record, page 4.

"The rational and true doctrine on this subject, is laid down by the Supreme Court of Louisana, in Dwight & Hartman vs. Beemis et al. 16 L. R. 150.

The question was, whether the plaintiffs, who had received a note for collection, had used proper diligence to exonerate them from liability. The Court held, "*if Allen was notoriously insolvent, a knowledge of that fact will excuse them.*" So we say here as Stewart, the

drawer of the note, never had been worth anything, the plaintiffs will be excused from doing the vain and expensive thing of suing him before going upon the Bank for its *laches*.

SIXTH. *On the Sixth Assignment of Error.*

1st. It was clearly error to refuse to rule, that the action against the Bank for failing to do its duty as an agent, and in not giving legal notice of the protest of said note to Henry Deval and his executors, is prescribed only by the lapse of *ten years* from the date of its said *laches*.

Original Record, page 42.

The Civil Code of Louisiana, Article 3544 (3508) provides: "In general, all personal actions, except those before enumerated, are prescribed by *ten years*."

In Eichelberger vs. Pike, 22 Ann. 142, it is clearly laid down that, "*the right to recover of a banker for failing to protest a note, whereby the endorser is discharged, is only prescribed by ten years.*"

2d. The Bank, in receiving the note for collection, was acting under the contract of mandate, which is prescribed only by the lapse of ten years.

C. C. 2985 (2954) to 3000 (2969).

16 Ann. R. 397, Hereford and Wife vs. Leverich, Curator.

3d. This action did not arise *ex delicto*, but *ex contractu*, and is only prescribed in ten years.

C. C. 3002 (2971), 3003 (2972).

15 Ann. 145, Garland vs. Scoty.

15 Ann. 535, Imboden vs. Richardson.

The case relied on by defendant of Emmerling vs. Graham, 14 Ann. R. 389, has no application to the case at bar.

That was a suit against the notary public, a public officer, and the prescription of one year barred that action, as was properly said by the Chief Justice.

But this is an action against a mandatory, and not one against a public officer, and is only prescribed in ten years.

It may be remarked of that decision, that it was rendered by a divided court, and has no warrant for its reasoning, either in the civil or commercial law, for subrogation, as we have shown, does not grow out of negligence. It refers to no authority, and is in conflict with the articles of the Code on that subject, as has been shown.

The decree affirming the judgment sustaining the prescription of one year was correct. But the reasoning is faulty. And one decision in Louisana does not settle the law,

This Court, in questions concerning the commercial law, is not controlled by ill advised State decisions, but settles the law for itself.

It would be dangerous to the large interests now entrusted to banks, which now do such an immense collecting business, to allow them to ruin their correspondents, and escape responsibility by saying that when they

employ a notary and give him special instructions, they are not responsible if loss follows by his adherence to such instructions, even though they shift all responsibility from the notary to the bank. The true doctrine is, that the specially instructed notary is nothing less than the agent of the bank, and his negligence, traceable to such instructions, is the negligence of the Bank.

But, the defendant contends that the plaintiffs cannot recover, because they did not sue R. A. Stewart, the drawer of the note.

Surely, this Court will not hold that the Bank shall escape indemnifying the plaintiffs for loss, resulting directly from its *laches*, because they did not do the expensive, vain and useless thing of suing an *insolvent* drawer, a man who never had any means, and out of whom one dollar could never have been made.

This is not required by over law, as shown under the last assignment of error.

16 L. R. 150, Dwight & Hartman vs. Beemis et al.

Respectfully submitted.

E. T. MERRICK,
G. W. RACE,
of Counsel for Plaintiffs in Error.

Supreme Court of the United States.

October Term, 1876.

STEPHEN BIRD AND THOMPSON BIRD, EXECUTORS OF JOHN BIRD, DECEASED, PLAINTIFFS IN ERROR,

vs.

THE LOUISIANA STATE BANK.

No. 62.

In Error to the Circuit Court of the United States for the District of Louisiana.

BRIEF FOR DEFENDANT IN ERROR.

The plaintiffs in error sued the defendant in the court below to recover damages supposed to result from an alleged failure, on the part of defendant, to give due notice of protest for non-payment to the endorsers on a promissory note, the property of the testator, transmitted to the bank for collection, by which failure, it was alleged, the plaintiffs lost all recourse against the endorsers on the note, amounting, with interest and costs of protest, to $6,165.

See petition, Record, pp. 1 and 2.

The defence of the bank was a general denial, (see Rec., p. 8,) and a plea of the prescriptions of one and five years, (same page.)

The case was tried by consent, duly entered, without a jury, and the court gave judgment for defendant, with costs.

See Rec., p. 10.

After an unsuccessful motion for a new trial, (see Rec., pp. 10 and 11,) the plaintiff has brought the record here by writ of error.

Record, p. 17.

The findings of the fact by the circuit court are on pages 15, 16, and 17 of the record.

ARGUMENT.

FIRST. It is submitted that in the first request to charge there is a want of precision in the language of plaintiff's counsel which resulted, perhaps, in a misconception of its meaning by the court. It is plain, on the face of the paper, that no mention of the *branch* bank is made; that no reference to the legal liability of the mother bank for the fault of the branch is given, and that the attention of the judge was directed solely to the duty of the mother bank. Though, perhaps, but one entity in law, they were certainly two entities in fact.

Clode *vs.* Bailey, 12 M. and W., 50.
Union Bank *vs.* Dunn, 17 La., (Miller,) 234.

The mother bank had a certain legal duty to fulfil, and to this the attention of the judge was directed. What was this duty? For, in strictness, the branch bank was the agent for collection of John Bird, and the mother bank was the agent of her branch. Had the branch been a distinct corporation, such would have been the legal relations, and

the plaintiff would have no cause of action against the mother bank for want of privity. (See the cases quoted on plaintiff's brief, page 14.) There is no such ambiguity and want of clearness in the two causes of action as set forth in the petition: one is for the fault of the mother bank and the other is for the fault of the branch bank at Baton Rouge, for which the mother bank is legally liable.

With this explanation the ruling of the court below is in strict conformity to Louisiana jurisprudence and the commercial law. The duty of the mother bank was fulfilled when it employed its regularly appointed notary to make the demand and protest the note for non-payment; and it is neither liable for any official misconduct of the notary, nor for his failure, if any, to give notice to the endorsers.

Hyde *vs.* Planters' Bank, 17 La., 560.
Fraisier *vs.* Gas Bank, 2 Rob., 294.
Baldwin *vs.* Bk. Louisiana, 1 Annual, 15.
Bellemire *vs.* Bank, 4 Wharton, 105.

The plaintiff in error distinctly admits in his argument that "the complaint against the bank is not for any laches "of the notary, for he did all the bank required of him; but "is for laches of the bank in failing to give legal notice "after having assumed to do it."

Indeed, by the commercial law, as well as by express statute of Louisiana, it cannot be reasonably maintained here that there was any fault in the notary.

Burke *vs.* McKay, 2 Howard, 66.
Sections 2507 *et. seq.* Revised Stats. of La.

He was under no duty, nor, it is submitted, were the officers of the bank and branch, *omissis omnibus aliis negotiis*, to notify each particular endorser. The notary had

fulfilled his whole official duty when he deposited the notices to the endorsers in the post office, under cover, and directed to the cashier of the branch of the State Bank of Louisiana at Baton Rouge.

Watson *vs.* Templeton, 11 La. Annual, 137.
Morgan *vs.* Van Ingen, 2 Johnson's Rep., 204.
Wamesit Bank *vs.* Buttrick, 11 Gray, 387.

The fault complained of in the mother bank is in having given directions, by her cashier, *Rondeau*, to the notary, to serve notice of protest on Rotchford, the New Orleans agent of Doyal, whereas Doyal was dead; the fact of death was entirely unknown both to the bank and its branch at the time, and Rotchford's agency legally, by this event, terminated. But this act of alleged "gross fault and negligence" worked not the slightest injury to the plaintiff. It was a friendly act on the part of the cashier to direct *ex abundanti cautelâ* the notary to one who had been Doyal's agent in New Orleans for many years. The inference that "if said directions had not been given, said notary "would, in pursuance of his duty, have ascertained, on "slight inquiry, that said endorser was dead, and that his "last place of residence was at New River, parish of As-"cension, where his executors and one or more of his heirs "lived," is quite too remote for judicial decision. Besides, it leaves in doubt the principal point of inquiry: What were the names and who were the heirs or administrators or executors to be notified? Or both and all? But even if the mother bank be censurable for this act of her cashier and all its alleged results, no legal obligation arises either on the part of the cashier individually or on the part of the bank, because responsibility only attaches when the

counsel is given with a bad intention and with the design to deceive. *Consilii non fraudulenti nulla obligatio est.*

Lex. 47 *De reg. jur.*, Digest, 50, 17.

Besides, admitting, *a. g.*, the responsibility for the act, the consequences are too remote, and not within the contemplation of the parties when the collection was undertaken.

Hadley *vs.* Baxendale, 26 L. & E., 398. *In jure, causa proxima non remota spectatur.*

The mother bank was, therefore, without fault in all respects in her share of this transaction. She had done all the law requires, whether civil or commercial.

The question, "whether there was any fault on the part of the branch bank, which made the mother bank liable," we respectfully submit, has not been plainly and directly made by any of the assignments of error. It having been clearly shown that the mother bank had committed no error in the protest of the note and the notices to the endorsers, what forms the subject of the complaint by the plaintiff against the branch and its cashier Pike?

"Duplicate notices of protest having been sent by said "notary to the cashier of the branch bank at Baton Rouge, "it was the duty of said branch bank and said cashier, as "the principal officer of said bank, acting for the branch "thereof at Baton Rouge, to have forwarded said notice "to the representatives of said endorser, (Doyal,) or "to have furnished the means of proving that said ser-"vice was made, which he failed to do; said Louisiana "State Bank, by said acts of negligence and failure to "perform its duty through its agents, having caused "damage to said Bird to the entire amount of said note "and costs of suit."

See Petition, Rec, p. 2.

This is evidently the only serious point in plaintiff's case. The note fell due January 31, 1860, and was regularly protested by the notary of the mother bank, who deposited on the same day, in the postoffice in New Orleans, post-paid, notices of protest for the several endorsers on said note, including one for H. Doyal, endorser, all under cover, addressed to W. S. Pike, Cashier, at Baton Rouge, Louisiana.

Rec., p. 16. Finding of fact 7th.

Plaintiff shows himself to be in possession of the note and protest, with notices to the endorsers, all in due order, as prepared by Notary Gottschalk soon after the note was protested, (see petition, Record, p. 1,) when he enters suit against the executors of Henry Doyal, with full knowledge and virtual approval of all the acts and doings of both the mother bank and branch, their officers and agents.

John Bird then knew of the notice for Henry Doyal, left with Rotchford, his agent.

John Bird then knew whether he himself had received notice of protest or not, for he was an endorser on the note. If he had received notice of protest and wanted to hold Doyal, a prior endorser, it was his legal duty to notify him.

McCullock *vs.* Commercial Bank, 16 La. Rep., 566.

If he had received no notice when he withdrew the protested note from the branch bank in order to sue upon it, and saw and knew what had been done by the notary, it was then his duty to proceed at once against the bank, and not wait ten years, less twenty-five days, to throw the loss upon the defendant. This delay is, in law, a ratification of the acts of the bank. So, too, bringing the suit against Doyal's

executors is an election not to avoid the acts of the bank, but to affirm them. Plaintiffs are clearly estopped.

Croft *vs.* Lumley, 6 H. L. C., 705, quoted in Clough *vs.* Railway, L. R., 7 Ex., p. 35.

Besides, Doyal endorsed the note January 28, 1859, and died the next day. Knowing these facts, it was Bird's plain duty to have notified the defendant, when he deposited the note for collection, of the death of Doyal, and given the names and residences of the administrators, executors, or heirs of Doyal, whom he desired to be notified in case of protest of the note. In the best of faith he should have acted towards the defendant and her notary, and this fact of the death of Doyal and the names of his representatives should have been written on the note, and thus pointedly called to attention; for the probabilities are infinite that Bird, who resided in Missouri, and his agent, A. Bird, who lived at Manchac, Louisiana, knew of Doyal's death when he deposited the note for collection in the branch bank. It is a legal presumption that every creditor knows his debtor. Banks, as a rule, only receive deposits for collection of notes and bills, as these approach their respective maturities. Banks are not depositories for the safe-keeping of commercial paper, without pay, for the accommodation of note-shavers. The distinction is very plain. As a discounter of notes and a holder merely for collection, the Bank occupies an entirely different legal relation towards prior endorsers from what it does towards its own notary.

The concealment of this all-important fact of Doyal's death from the bank and its branch, its agents and subagents, leaves Bird without any legal justification or excuse. It was this *suppressio veri* which was the proximate cause of the deficient notice of protest, if any such

there be. The loss resulting therefrom cannot, in law, be transferred to the bank.

It was by no means the collection and protest of an ordinary note under the ordinary circumstances, but a case calling for the exercise of unusual diligence on Bird's part, for his note was, to his own knowledge, absolutely worthless without a proper notification to Doyal's personal representatives of the certain *protest* of the note, for Stuart, the drawer, being insolvent, "had *never* been in a position "to pay the same, nor had in his own right any property "out of which said note could have been made." And of this important fact not a word of notice to the defendent was given by Bird. *Volenti non fit injuria.*

Besides, plaintiff has waived the jury and must consequently expect the court to take a liberal and enlarged view of the facts found by the judge below.

Bank *vs.* Smith, 11 Wheat. 171.

Plaintiff was bound to prove that Pike failed to notify all the endorsers, and specially Henry Doyal's representatives; but the facts found establish the very reverse.

See 10th finding, on page 16 of the Record.

We conclude that there was no fault on the part of the branch bank that makes the mother bank liable in this action; and this disposes of the first and second assignment of errors.

Second. The court below farther ruled that plaintiffs had lost all recourse against Stuart by lapse of time, and hence could not subrogate the defendant to all his rights as they existed on the day of protest, and that plaintiffs' action was prescribed in five years, and that this action could not be maintained.

It is a presumption of law that if Stuart, the drawer of the note, had been sued for the amount of it, he would have pleaded prescription.

Anderson *vs.* Johett, 14 La. Annual, 615.

After the lapse of five years from the maturity of the note Stuart was no longer bound to pay the note. He was released from all legal liability by Bird's inaction during the statutory period.

La. Code of 1870, article 3540.

Hence, even if the defendant were now compelled to pay the note sued on, Bird could no longer subrogate the bank to any rights against the drawer, Stuart. This, though feebly denied, is the well-known doctrine of both civil and common law, so familiar and conclusive that Judge Cole, in Emerling *vs.* Graham, (14 La. An., 389,) whilst he enunciates the *ratio decidendi*, does not even refer to the article 3030 of the Code then in force, which is the same as the article 3061 of Louisiana Code of 1870, embodying the principle.

Nor does the chief-justice of Louisiana, when deciding Waldo *vs.* Bell, (13 An., 331,) but in reversing the judgment and entering up a new one, as a matter of course, subrogates the sheriff to the judgment, which by his fault—his failure to return a writ of *fi. fa.* on the return day—has been lost to the original plaintiffs.

The reason is perfectly plain. The act causing the damage is not done illegally, wickedly, and with intent to injure, for this would be a criminal tort, an offence; but it is done from error, neglect, or imprudence, and is a civil tort, a *quasi* offence. And on payment of the damage the debtor is entitled to a full subrogation to all of the rights

of the creditor at the time the injury was inflicted, just as though the debtor had been in the position of a surety.

"The surety is discharged when by the act of the crditor "the subrogation to his rights, mortgages, and privileges "can no longer be operated in favor of the surety." So reads the Louisiana Code, art. 3061, before quoted. The principle is laid down in Lord North's case, (2 Dyer, 161,) quoted in Bellemire's case; and without reference to authorities, it is enunciated in Hall & Long *vs.* Railroads, (13 Wallace, 370,) as follows:

"Standing thus, as the insurer does, practically in the "position of a surety, stipulating that the goods shall not "be lost or injured in consequence of the peril insured "against," [in our case, that the note shall not be lost in consequence of our fault,] "whenever he has indemnified "the owner for the loss, he is entitled to all the means of "indemnity which the satisfied owner held against the "party primarily liable. *His right rests upon familiar "principles of equity.* It is *the doctrine of subrogation*, "*dependent not at all upon privity of contract*, but "worked out through the right of the creditor or owner." This is not a mere *obiter dictum* falling from a court in the heat of argumentation; it is an enunciation of a principle as old and as enduring as the law itself.

But whilst covertly admitting this "familiar principle" in excuse, the plaintiff pleads that to sue Stuart would have been "the expensive, vain, and useless thing of suing "an *insolvent* drawer, a man who NEVER had any means, "and out of whom one dollar could NEVER have been "made."

Plaintiff by his inaction has destroyed Stuart's legal obligation to pay his note; his natural obligation to pay it remains. All legal remedy upon it has been lost. But

non constat, that Stuart may not be entirely "sufficient" in the future, Some rich relative may die and leave him a large property, or any imaginable number of like things might happen to enable him to pay. "Industry, talents, "and integrity constitute a fund which is as confidently "trusted as property itself."

See the entire paragraph in Sturges *vs.* Crowninshield, 4 Wheaton, 198.

The great error of plaintiff in this regard lies in his hasty assumption of a false premiss, the seeming "vanity" of suing Stuart, and the worthlessness of the *spes recuperandi.*

The lower court ruled that the action of plaintiff against the bank was prescribed in five years under Louisiana law. Plaintiff's counsel say that the prescription of ten years applies, whilst we as confidently say that it is prescribed in one year.

The ruling of the lower court is only the application of the common prescription applicable to negotiable promissory notes, and would be conclusive if this were an action on the note; because the law of the forum "governs the "forms, the effects, and the prescription of actions."

Louisiana Code of Practice, Art. 13.

But one complaining of injustice must assert the violation of law which injures him in his petition, or *narr.*, in clear terms, and prove the facts of the case by legal evidence. The *allegata* and *probata* must agree. Hence, the character which plaintiff gives to his action by his pleadings must govern in determining the prescription applicable to it. The burden of plaintiff's complaint here is "negligence and failure to perform duty," *i.e.*, FAULT. "Every act whatever of man that causes damage to another

" obliges him by whose fault it happened to repair it." Louisiana Code, 1870, Art. 2,315.

Fletcher *vs.* Rylands, L. R. 3, Ex. 352.

The acts of man are here contrasted with the acts of God; the former bind, the latter loose; and the idea of " duty," the synonym of " obligation " in its most general sense, is fully implied. Not alone public duty, for whose violation resort for satisfaction may be had both to criminal and civil jurisdictions, but including also private duty and excluding every notion of *criminality*. Our position is that all these *faulty* acts are either criminal or civil torts, offences or quasi-offences, and are governed by the prescription of one year, under Article 3,536, " that " action for damages * * * resulting from offences or " *quasi* offences." In other words, the present suit is brought for damages arising *quasi ex delicto*, and not for damages arising *ex contractu*. It may be said that this prescription is very short and inapplicable to this case; but those objections were met and fully explained in two very early cases, which have never been impugned.

Fisk *vs.* Browder 6, Martin, N. S., 691.
Balfour *vs.* Browder 6, " " 708.

They were sustained by Associate Justice Campbell on the circuit in 1857–8, in Wiseman *vs.* Chiapella, 23 Howard, 368, in analogy to the Statute of Limitations in New York and Alabama, and the forms of action, debt on bond or action on the case; but the Supreme Court put the case on a different ground, and which had been a very short time before ruled differently in another Louisiana case, Musson *vs.* Lake, 4 Howard, 262, and thus the question of prescription was avoided. But if the prescription we urge be thought too short, plaintiff's is entirely too long. It

cannot be denied that the time, whatever it may be, begins to run from the commission of the act, of which plaintiff has immediate notice; for, whether the note be protested or not, plaintiff, if he acts as a prudent father of a family, will make proper inquiries at an early day and ascertain full particulars, as he did in this case. If this were not so, "much harder would it be for the defendant if the *suc-* "*cessive consequences* would suspend the running of the "statute. It would not be a *statute of repose*, but a *wake-* "*ful watch* to keep the defendant ever in suspense."

Funk *vs.* Smith, 66 Penn. 29.

It cannot be denied that an action of a principal against his agent is a personal action, but the prescription is very different when this personal action is brought for the misfeasance or non-feasance of the agent from what it is when brought to enforce the fulfilment of the letter of attorney, and the rendition of an account.

Barton *vs.* Dickens, 48 Penn. R., 528.

In Bank *vs.* Triplett, 1 Peters, 25, it is even called a "*mal-agency*," and an agent cannot be liable for loss occurring in the discharge of his duty unless he has been guilty of negligence, malversation, or fraud.

1 Story's Equity, § 645.

We are referred to Eichelberger *vs.* Pike (22 Annual, 142) on this point. It is a much better authority for the doctrine we advance on the point of subrogation in this argument. It borders on absurdity to hold a bank liable for ten years for grossly failing to protest a note. The court says: "The plaintiff, by the terms of his action, had "to show that the endorser of the note was his only re-

" liance for payment, and it was competent for him to " show that he had used the appropriate means to recover " the debt from the maker without effect." With all due submission, we think Eichelberger might have sued Pike at once, and recovered, without going through all these " passages that lead to nothing."

Chicopee Bank *vs.* Philadelphia Bank, 8 Wall., 641.

" The law of Louisiana is in itself unobjectionable, and " it is not with that law, but with the decision of the courts " upon that law," that your honors have to deal in commercial cases.

Marine Co. *vs.* Hunter, L. R., 3 Chancery, 484.

It appears in Eichelberger *vs.* Pike that defendant had employed one Skolfield to protest the note, and he had neglected it. As notary or sub-agent Skolfield was undoubtedly liable to Eichelberger. Was he, too, liable, under Louisiana law, for ten years, to a personal action? The Supreme Court of Louisiana has decided otherwise in

Taylor *vs.* Graham, 15 La. An., 418.

It is quite clear that the notary, sheriff, attorney, recorder, &c., all stand upon the same ground. Whether the action is on the case for negligence or debt on bond, the prescription should be the same.

If the old decisions are to be done away with, it should be by legislation. Legal relations cannot be changed, except by new law institutes. A tort and a contract will always be two different things; equally so are actions for damages *ex contractu* and *ex delicto*, under all systems of jurisprudence. We submit that the failure of a bank to protest a

note deposited with it for collection is a quasi offence, a civil tort, and that an action for damages resulting therefrom is an action *quasi ex delicto*, and under Louisiana law barred by the prescription of one year, under La. Code, 3536, relative to actions for offences and quasi offences.

If the case be regarded as one strictly sounding in damages, as an action of trover, then the *allegata* and *probata* would not agree, for the plaintiff's proof showing the loss of his note shows also that the note was without value when he entered suit against the bank.

Dow *vs.* Humbert, 1–31, 1876. Miller, J.

We therefore pray that the judgment of the lower court be affirmed, with costs, and all further general and equitable relief.

JAMES McCONNELL,
DURANT & HORNOR.
Att'ys for Appellees.

WASHINGTON, D. C., *August* 5, 1876.

21 D Lewis Rev 5 86

34 NE 128

7 Bow - 466

2 Lee - 467

26 Bank 138

18 NS 327 other

20 Johns

52 NY

11 Gray anderson

6 Mut